Supreme Court, U.S.
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No. 06-322 AUG 31 2006

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In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

AIKEN & SCOPTUR, S.C., TIMOTHY J. AIKEN, PAUL J. SCOPTUR AND KELLY I. CENTOFANTI,

Respondents.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals, District I

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the Wisconsin Court of Appeals' failure to remand the appellate brevity matter for consideration as to whether Aikens & Schaffer's request violated Wisconsin Statutes, Sec. 809.19(8), and the Wisconsin Supreme Court's failure to rectify this error violate Ronald W. Morton's rights to due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Mr. Morlock's former attorneys, Robert R. Burton and Nicholas C. Zales, did not appeal from the fee assessments against them. Because this petition involves a deprivation of Fourteenth Amendment rights by the Wisconsin courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin.

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*Effective July 1, 2005, Sec. 814.025 was repealed and former Sec. 802.05 was repealed and recreated by the Wisconsin Supreme Court pursuant to Order No. 03-06.

PETITION FOR WRIT OF CERTIORARI

The petitioner, Ronald W. Morters, prays that a Writ of Certiorari issue to review the portion of the decision of the Wisconsin Court of Appeals, District I, entered in this action on February 14, 2006 which was adverse to the petitioner wherein the Court failed to remand the respondents' appellate fee request to the trial court for frivolity consideration, and the portion of the order of the Wisconsin Supreme Court entered on June 14, 2006 wherein the Supreme Court denied his Petition for Review[1] of such portion of the Court of Appeals' decision.

OPINIONS BELOW

The order of the Wisconsin Supreme Court, dated June 14, 2006, denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to this Petition at G1-2. The decision of the Wisconsin Court of Appeals, District I, dated February 14, 2006 is published at 2006 WI App. 46,[2] 289 Wis. 2d 833, 712 N.W. 2d 71 (Ct. App. 2006) and is reprinted in the Appendix at A1-11.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on February 14, 2006. A timely Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on June 14,

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[1] The Supreme Court also denied review of other matters related to the trial court fee assessment raised by Mr. Morters.

[2] This is the Wisconsin public domain citation, and the decision can also be accessed through the Wisconsin Supreme Court's Web Site at www.wicourts.gov.

2006 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. This petition for writ of certiorari was filed within 90 days of the date of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin Supreme Court and the decision of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provision involved in this case is Section 1 of the Fourteenth Amendment of the United States Constitution, which is set forth at App. H1. This case also involves Article I, Secs. 1 and 9, of the Wisconsin Constitution which are reproduced at App. H1-2. The state statute involved is Wisconsin Statutes, Sec. 814.025, which is set forth at App. H3-4.[3]

STATEMENT OF THE CASE

A. Proceedings in Waukesha County

Ronald W. Morters, his wife, Ann, and their granddaughter, Shannon, were injured in a 1990 automobile accident and retained Attorney Charles H. Barr to handle their personal injury claims. Barr commenced a lawsuit in Waukesha County Circuit Court against the other driver and his insurer. Policy limits were determined to be $1,000,000.00. Barr was dismissed, however, due to his unauthorized agreement to adjourn the scheduled jury

[3] Effective July 1, 2005, Sec. 814.025 was repealed as part of the revision of Wisconsin's trial court frivolity law.

trial in the case to allow mediation. The mediation produced a *combined* settlement offer of $575,000.00 which was rejected. (App. O2-3)

In August of 1994, the Morters retained Aiken & Scoptur, S.C. to continue thei. personal injury action. Mr. Morters specifically advised Aiken & Scoptur that he wanted a jury trial. The Morters fired Aiken & Scoptur in July of 1995 after they had agreed to remove the case from the trial calendar and submit it to arbitration without Mr. Morters' knowledge and consent. Aiken & Scoptur claimed that Mr. Morters had agreed to arbitration. At his wife's insistence, Mr. Morters proceeded to arbitrate because of her stress and illness which ultimately resulted in her death. The arbitration awarded a total of $557,384.17 on the three claims. (App. C2-3, O3)

Barr and Aiken & Scoptur then brought motions to collect their fees. The Morters challenged their former attorneys' entitlement to fees on the grounds that their actions breached their respective contracts for representation. Waukesha County Circuit Judge James R. Kieffer ruled that the Morters did not have just cause to discharge their former attorneys and awarded fees to both. (App. C3, O3) This decision was affirmed by the Wisconsin Court of Appeals in its May 5, 1999 decision. (App. T1-2)

B. Summary of Barr Litigation

Before commencing this action, Ronald and Shannon Morters filed separate lawsuits against Attorney Barr in Milwaukee County Circuit Court alleging, among other

things, that Barr's conduct deprived them of a jury trial.[4] (App. O3-4) All of these claims were dismissed by virtue of the Court's adjudications granting partial summary judgment in January of 2001 and directed verdict in May of 2001. (App. O2, 4) In an October 18, 2001 decision, the Court, which was presided over by a different judge due to judicial rotation, found all of the claims against Barr to be frivolous. (App. N1-4)

The Wisconsin Court of Appeals upheld the dismissal of these claims in its April 30, 2002 decision. (App. O2) The *Wisconsin Supreme Court declined* to review this matter. The frivolity determination was affirmed by the Court of Appeals in a decision dated March 25, 2003. (App. Q1-5) On June 12, 2003, the Wisconsin Supreme Court denied Morters' petition to review the frivolity matter. Mr. Morters then filed a petition for certiorari with the United States Supreme Court seeking review of the frivolity determination. Such petition, which was designated as No. 03-369, was denied in an order dated November 17, 2003.

On December 12, 2003, Mr. Morters filed a motion in Milwaukee County Circuit Court pursuant to Wisconsin Statutes, Sec. 806.07(1)(h) to set aside and nullify the frivolity judgment against him. At a hearing held on January 26, 2004, the Court denied his motion. (App. R1-3) The Court of Appeals affirmed the trial court's adjudication in its December 21, 2004 decision. (App. S1-4) On March 8, 2005, the Wisconsin Supreme Court denied Morters' petition for review of such matter. In a petition for certiorari designated as No. 04-1621, Mr. Morters requested review of these adjudications. On October 3,

[4] Ronald's action was filed in July of 1999, and Shannon's was commenced in February of 2000.

2005, the United States Supreme Court denied the petition. A subsequent petition for rehearing was denied by the Court on November 14, 2005.

C. Milwaukee County Circuit Court Proceedings

On May 18, 2001, Ronald commenced the current action against Aiken & Scoptur. He alleged that Aiken & Scoptur's conduct caused him to lose his jury trial right and required him to submit to arbitration which resulted in a substantially lesser recovery. Aiken & Scoptur moved for summary judgment, and their motion was granted by the Court on August 26, 2002. (App. L7) Although the Court recognized the existence of a genuine issue as to whether Ronald had agreed to binding arbitration, the Court granted summary judgment based on the absence of causation and damages, public policy, the arbitration award, and the doctrines of issue and claims preclusion. (App. L2-3)

Aiken & Scoptur then moved for a frivolity finding and award of attorneys fees and costs pursuant to Sec. 814.025. In its February 28, 2003 decision, the Circuit Court denied this motion. A subsequent motion for reconsideration of the frivolity matter was denied as well. (App. M4) Mr. Morters subsequently appealed from the decision granting summary judgment, and Aiken & Scoptur cross-appealed from the adjudications denying their frivolity motion.

D. Court of Appeals' March 16, 2004 Decision

In his appeal, Ronald presented the following five issues: 1) whether he showed the existence of a genuine issue of fact as to whether Aiken & Scoptur's conduct caused injury which resulted in damage to him; 2) whether

public policy should preclude his claims; 3) whether the arbitration award precluded his claims; 4) whether his claim was barred by the doctrine of claims preclusion; 5) whether his claim was barred by the doctrine of issue preclusion. The Court of Appeals in its March 16, 2004 decision affirmed the grant of summary judgment. (App. C1-9) The Court held that Ronald's claims were barred under the doctrine of claims preclusion by virtue of the fee hearing before Judge Kieffer. (App. C2, 5-9) The Court did not address the other issues raised by Mr. Morters. (App. C2)

Because Judge Kieffer determined that Mr. Morters had consented to arbitrate, the Court concluded that a reasonable litigant should have known the filing of such claim was without any basis in law or fact. (App. C10) Accordingly, the Court reversed the lower court's decisions denying the frivolity motion and determined that the action was frivolous pursuant to Sec. 814.025(3)(b). (App. C10) The Court specifically cited Sec. 814.025(3)(b). (App. C10) The case was remanded to the trial court for a hearing to determine Aiken & Scoptur's reasonable costs and fees. (App. C10)

The decision made no reference to Sec. 809.25(3)[5] and contained no appellate frivolity finding against Mr. Morters. (App. C1-10) The Court's direction on remand did not include any instruction to assess appellate costs and fees. (App. C10) There was no discussion regarding whether all of the appellate issues were frivolous. (App. C10) No motion for an appellate frivolity finding and award pursuant to Sec. 809.25(3) was ever filed by Aiken & Scoptur

[5] Sec. 809.25(3) is the Wisconsin statute which deals with frivolous appeals.

during the appellate proceedings. (App. A6-7) Ronald filed a petition for review of the Court of Appeals decision with the Wisconsin Supreme Court which was denied on August 2, 2004.

E. Remand Proceedings in the Trial Court

Despite the absence of any appellate frivolity finding, Aiken & Scoptur contended on remand that they were entitled to appellate costs and fees and sought to recover approximately $20,000.00 for the same. With respect to trial court costs and fees, Aiken & Scoptur sought in excess of $19,800.00.

Mr. Morters asserted that Aiken & Scoptur were not entitled to any appellate fees because they had not brought a motion in the Court of Appeals pursuant to Sec. 809.25(3) and the Court had made no appellate frivolity finding. Ronald cited considerable case law demonstrating that Sec. 814.025 did not apply to appeals and that the trial court had no authority to assess appellate frivolity fees without an appellate frivolity finding by the Court of Appeals. Regarding trial court fees, Ronald argued that all such fees should be allocated against his former attorney, Robert E. Sutton, who represented him until withdrawing in May of 2002. Mr. Morters also contended that no trial court sanctions should be imposed because Aiken & Scoptur had failed to meet their duty of mitigation by failing to file a timely frivolity motion.

In its January 7, 2005 decision, the trial court rejected Mr. Morters' mitigation arguments. (App. B7-8) With respect to allocation, the Court believed that fairness dictated splitting the trial court fees and costs between the attorney and the client. (App. B11-12) The Court split equally between Morters, Attorney Sutton, and Attorney

Nicholas C. Zales[6] the fees and costs attributable to their respective periods of involvement. (App. B12)

In deciding whether to award appellate costs and fees, the Court admitted that the Court of Appeals did not direct such assessment and that Aiken & Scoptur did not make such a request to the Court of Appeals. (App. B14) The Court recognized the authority cited by Ronald which indicated that only the Court of Appeals may find an appeal frivolous and direct the award of appellate fees. (App. B15) Nevertheless, the Court believed that it could award such fees based upon certain language contained in *Richland County v. Department of Health and Social Services*, 146 Wis. 2d 271, 279-280, 430 N.W. 2d 374 (Ct. App. 1988) which, in its view, suggested that the Circuit Court could award appellate costs under Sec. 814.025 in order to make whole the victim of a frivolous action. (App. B15-20) All appellate costs and fees were assessed against Ronald. (App. B12) A subsequent reconsideration request regarding the appellate assessment was denied as well. (App. F1-2)

The January 19, 2005 order for judgment reflected the final calculation of the amounts assessed which were as follows: $10,123.09 against Ronald for trial court frivolity costs and fees, $17,820.02 against Ronald for appellate frivolity costs and fees, $4,927.84 against Sutton for trial court costs and fees, and $5,233.25 against Zales for trial court costs and fees. (App. E1-3) On February 3, 2005, judgment for their respective assessments was entered against Morters, Sutton, and Zales. (App. D1-2)

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[6] Attorney Zales represented Morters at the trial court level following Sutton's withdrawal. Ronald acted pro se in all of the appellate matters due to difficulty in obtaining counsel.

F. Subsequent Proceedings in the Court of Appeals

On March 10, 2005, Mr. Morters appealed from the assessment judgment against him. In his Appellant's Brief, Ronald presented substantial authority demonstrating that a trial court does not have the authority to assess appellate frivolity fees when the Court of Appeals did not find the appeal to be frivolous pursuant to Sec. 809.25(3). (App. J1-17) He pointed out that *Richland County* was clearly distinguishable from this case because the Court of Appeals on page 273 of the decision had specifically directed the assessment of appellate frivolity costs. (App. J10-11)

Following the release of the Wisconsin Supreme Court's opinion in *Howell v. Denomie*, 2005 WI 81, 282 Wis. 2d 130, 698 N.W. 2d 621 (2005), Ronald submitted a letter brief as a citation of supplemental authority outlining *Howell*'s reaffirmance of the fact that appellate frivolity is solely within the province of the Court of Appeals. (App. K1-3) In the event that the Court of Appeals reversed the appellate frivolity assessment, Mr. Morters requested the Court to remand such matter to the trial court with instructions for the trial court to consider whether Aiken & Scoptur's appellate fee request was violative of Sec. 814.025. (App. J18) Regarding the trial court fees, Ronald contended that the trial court misunderstood the duty of mitigation and that Aiken & Scoptur should have acted earlier. Mr. Morters also discussed why all of the trial court fees should have been assessed against Sutton.

In addressing the appellate frivolity assessment, the Court of Appeals agreed with Mr. Morters that Wisconsin law requires an appellate court to determine an appeal is frivolous before a trial court can assess appellate costs and

fees. *Morters v. Aiken & Scoptur*, 2006 WI App. 46 at par. 8, 289 Wis. 2d 833, 712 N.W. 2d 71 (Ct. App. 2006). (App. A5) The Court cited the language of Sec. 809.25(3) which requires the Court to find that an appeal was without any reasonable basis. *Morters*, 2006 WI App. 46 at par. 9. (App. A5-6) According to Sec. 809.01(4), "the court" as used in Sec. 809.25(3) refers to the Court of Appeals or Supreme Court. *Morters*, 2006 WI App. 46 at par. 10. (App. A6) The authority for making an appellate frivolity finding is vested with the appellate court, and a trial court cannot make an appellate frivolity finding. *Morters*, 2006 WI App. 46 at par. 10. (App. A6-7)

The Court emphasized that it did not make any findings as to whether the 2004 appeal was frivolous. *Morters*, 2006 WI App. 46 at par. 10 & 11. (App. A6-7) Aiken & Scoptur did not make any appellate frivolity motion at any time during the 2004 appellate proceedings. *Morters*, 2006 WI App. 46 at par. 10. (App. A6-7) While the Court of Appeals can *sua sponte* find an appeal to be frivolous, that did not occur in the 2004 appeal. *Morters*, 2006 WI App. 46 at par. 11. (App. A7)

Because the Court of Appeals in *Richland County* specifically directed the trial court to assess appellate fees, such case was factually distinguishable and did not control in this case. *Morters*, 2006 WI App. 46 at par. 14. (App. A8) The Court reversed the portion of the judgment which ordered Morters to pay $17,820.02 in appellate fees. *Morters*, 2006 WI App. 46 at par. 15. (App. A8) The Court, however, did not remand this issue to the trial court for a determination as to whether the request for an appellate assessment violated Sec. 814.025. *Morters*, 2006 WI App. 46 at par. 15. (App. A8) The Court affirmed the portion of the judgment imposing trial court fees and denying the

mitigation assertion. *Morters*, 2006 WI App. 46 at par. 16-22. (App. A8-10)

G. Supreme Court Proceedings

In light of the overwhelming authority which showed the appellate frivolity request to be baseless, Mr. Morters argued in his petition for review that fairness and compliance with his right to due process of law under the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution required that the appellate frivolity request be remanded for a determination as to whether such request violated Sec. 814.025. (App. I1-2) Ronald also sought review of the Court of Appeals decision regarding trial court fees.

In its June 14, 2006 order, the Wisconsin Supreme Court denied Ronald's petition for review in its entirety. (App. G1-2) Aiken & Scoptur cross-petitioned for review of the Court of Appeals' reversal of the appellate frivolity determination, and the Supreme Court denied their cross-petition as well in the June 14, 2006 order. (App. G1-2) As of this writing, the portion of Ronald's deposit related to appellate fees required by the trial court as security for pursuing the appeal has not been returned to him.

The Supreme Court's refusal to order that the appellate frivolity matter be remanded for a Sec. 814.025 determination has effectively deprived Mr. Morters of procedural due process and equal protection of the law. By virtue of the arguments presented in his appellate briefs and petition for review and the inaction of the State of Wisconsin's highest court, the deprivation of Ronald's constitutional rights was timely and properly raised and is now properly within the jurisdiction of this Court for review on a writ of certiorari.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE WISCONSIN COURT OF APPEALS' FAILURE TO REMAND THE APPELLATE FRIVOLITY MATTER FOR CONSIDERATION AS TO WHETHER AIKEN & SCOPTUR'S REQUEST VIOLATED WISCONSIN STATUTES, SEC. 814.025, AND THE WISCONSIN SUPREME COURT'S FAILURE TO RECTIFY THIS ERROR HAVE VIOLATED RONALD W. MORTERS' RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SEC. 1, OF THE WISCONSIN CONSTITUTION.

A. Introduction and General Constitutional Discussion

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the States from depriving any person of life, liberty, or property without due process of law, and the Equal Protection Clause forbids the States from denying "to any person within its jurisdiction the equal protection of the laws." Article I, Sec. 1, of the Wisconsin Constitution declares that Wisconsin's citizens have certain inherent rights, among those are life, liberty, and the pursuit of happiness. The Wisconsin Supreme Court has interpreted Article I, Sec. 1, as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth Amendment. See *Chicago & N.W. Ry. v. LaFollette*, 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969). Mr. Morters' due process and equal protection rights are thus guaranteed by both Constitutions.

Article I, Sec. 9, of the Wisconsin Constitution further protects due process rights by providing that every person is

entitled to a remedy in the laws for his injuries. In *Metzger v. Wisconsin Dept. of Taxation*, 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), the Wisconsin Supreme Court interpreted Article I, Sec. 9, as entitling litigants to their day in court.

According to *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) and *Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934), due process of law protects against arbitrary action. *Black's Law Dictionary*, 4th Edition (1957) *defines arbitrary as "without adequate determining principle," "not done or acting according to reason or judgment," "without cause based upon law," or "not governed by any fixed rules or standard."* All of these characterizations describe the Court of Appeals' inexplicable failure to remand the appellate frivolity request to the trial court for a determination as to whether it was frivolous. The denial of access to the judicial process constitutes a deprivation of due process in the most blatant sense and runs contrary to the fiduciary responsibility of the Wisconsin courts to insure equal justice for all citizens.

In a plurality opinion in *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956), the Court noted that " . . . at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from *invidious discriminations*. When the Court's treatment of Ronald in this instance is compared with the favorable treatment afforded to Barr and Aiken & Scoptur at other stages of this litigation, the situation at hand exemplifies the very essence of favoritism and unfair discrimination. Such disparate treatment, if left unchecked, will eventually corrupt the legal system.

In the following discussion, Mr. Morters will show that Aiken & Scoptur's appellate frivolity request was improper and baseless under Wisconsin law. By failing to remand such matter for a frivolity determination, the Court will see that

the Wisconsin appellate courts have effectively deprived Ronald of due process and equal protection of the law. Since the Wisconsin courts are an arm of the State and their actions have deprived Ronald of the opportunity to recover statutory sanctions, the requisite State action necessary to invoke the protection of the Fourteenth Amendment is certainly present.

Although the Court has repeatedly declared that the denial of certiorari does not import any expression of its views as to the merits of the case or whether the case was correctly decided,[7] the Court should be greatly concerned about whether the Wisconsin courts have interpreted the previous denials of certiorari herein as acquiescence in the deprivation of Ronald's constitutional rights. Throughout the history of this litigation, the violation of Ronald's Fourteenth Amendment rights has become more and more offensive. The Court should now send a clear message to the Wisconsin courts that due process and equal protection must be respected.

B. Wisconsin's Procedural Process Dealing with Trial Court Frivolity

Wisconsin's previous trial court frivolity statute, Sec. 814.025,[8] which was in effect when Aiken & Scoptur requested appellate frivolity fees in 2004 allowed the recovery of costs and reasonable attorney fees if an action was found to be frivolous by the court. (App. H3-4) In order to find an action to be frivolous, the court must find one or more of the following pursuant to Sec. 814.025(3):

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[7] See for example, *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923) and *Teague v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[8] As part of the recreation of Wisconsin's trial court frivolity law, Sec. 814.025 was repealed effective July 1, 2005.

> "(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." (App. H4)

As discussed in Ronald's previous Wisconsin appeals and in Petition for Certiorari No. 04-1621 to this Court, Wisconsin's frivolity law had serious problems because it failed to provide for an advanced notice requirement and safe harbor similar to Rule 11(c) of the Federal Rules of Civil Procedure.

Pursuant to Wisconsin Supreme Court Order No. 03-06,[9] Sec. 814.025 was repealed and Sec. 802.05 was repealed and recreated so as to adopt Rule 11, with certain modifications, as Wisconsin's new trial court frivolity law. With the adoption of this new law, the problems regarding the lack of advanced notice and a safe harbor were eliminated. While modifying the language somewhat, Secs. 802.05(2)(a) and (b) essentially preserved Sec. 814.025(3)'s definition of frivolity *as being claims which are brought for harassment purposes or without any reasonable legal basis under existing law and could not be supported by good faith argument for legal modification or reversal.* (App. H2-3) Under both the old and new trial court frivolity law, Wisconsin provided a procedure for sanctioning baseless legal claims. *After recognizing that Aiken & Scoptur's appellate fee*

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[9] This Order was dated March 31, 2005, and it provided an effective date of July 1, 2005 for the new law.

request had no legal basis, the Wisconsin Court of Appeals should have remanded such matter to the trial court for frivolity consideration. By failing to do so, the Court deprived Ronald of the due process to which he was entitled.

C. Clear Authority Showing No Reasonable Basis for Appellate Fee Request

The authority for an appellate frivolity award is derived from Sec. 809.25(3)(a) which provides, in relevant part, as follows:

> "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief."

Sec. 809.25(3)(a)'s statutory mandate clearly requires a timely frivolity motion in the Court of Appeals and a finding by the Court of Appeals before a frivolity award can be made. A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or the Supreme Court if the case has reached that level. The plain language of Sec. 809.25(3)(a) does not permit a trial court to award appellate frivolity fees. Such authority is vested in the Court of Appeals. Despite such obvious statutory language, the trial court elected to exceed its authority and improperly award appellate fees.

Sec. 809.25(3)(c) sets forth the following prerequisite for finding an appeal to be frivolous:

> "In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

Once again, the clear language of the statute requires the Court of Appeals to make the necessary determination.

In this case, Aiken & Scoptur failed to file a frivolity motion with the Court of Appeals in accordance with Sec. 809.25(3)(a). *Morters*, 2006 WI App. 46 at par. 10. (App. A6-7) The Court of Appeals did not discuss appellate frivolity and made no such finding. *Morters*, 2006 WI App. 46 at par. 10-11. (App. A6-7) In its March 16, 2004 decision, the Court addressed *trial court frivolity* under Sec. 814.025(3)(b) and reversed the trial court's determination on such issue. (App. C10) The remand was for the purpose of determining the amount of trial court costs and fees. (App. C10)

An examination of case law confirms that the authority to determine appellate frivolity is vested in the Court of Appeals. Citing *J. J. Andrews, Inc. v. Midland*, 164 Wis. 2d 215, 225, 474 N.W. 2d 756 (Ct. App. 1991), the Court in *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 841, 520 N.W. 2d 93 (Ct. App. 1994) noted that "[w]e decided as a matter of law whether an appeal is frivolous." The Court referred to Sec. 809.25(3)(c)'s requirement that it must find that the appeal was filed in bad faith or was without a reasonable basis. *NBZ*, 185 Wis. 2d at 841.

In *Lucareli v. Vilas County*, 2000 WI App. 157, par. 9, 238 Wis. 2d 84, 89, 616 N.W. 2d 153 (Ct. App. 2000), the Court noted that only an appellate court can find an appeal

frivolous under Sec. 809.25(3). The Court in *Lucareli* had made the appellate frivolity determination and remanded the case to the trial court for a determination of the amount of reasonable attorney fees. *Lucareli*, 2000 WI App. 157 at par. 8. The Court in *Sheard v. Sheard*, 129 Wis. 2d 308, 309, 384 N.W. 2d 712 (Ct. App. 1986) insisted on a timely frivolity motion pursuant to Sec. 809.25(3)(a). A review of *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 675, 457 N.W. 2d 538 (Ct. App. 1990) and *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 357, 302 N.W. 2d 508 (Ct. App. 1981) shows that Sec. 814.025 does not apply to appeals.

The situation in the *Richland County* case was clearly distinguishable from this case. In *Richland County*, the Court agreed with the litigant's claim that she was entitled to costs and attorney's fees on the appeal. *Richland County*, 146 Wis. 2d at 278. On its remand to the trial court, the Court specifically instructed that "[t]he award shall include costs and fees on this appeal." *Richland County*, 146 Wis. 2d at 273. In *Howell*, the Wisconsin Supreme Court reaffirmed the fact that appellate frivolity is within the province of the Court of Appeals. *Howell*, 2005 WI 81 at par. 9.

A reference to the Wisconsin Constitution further established that a trial court does not have the authority to make an appellate frivolity finding. Article VII, Sec. 5(3) of the Wisconsin Constitution gives the Court of Appeals appellate jurisdiction in the district as the legislature may provide by law. Sec. 808.03 provides for both appeals as of right and appeals by permission. Article VII, Sec. 8, gives the Circuit Courts original jurisdiction in all matters civil and criminal except as otherwise provided by law. The Circuit Court's jurisdiction is subject to the appellate and supervisory powers reserved by the Constitution to the Court of Appeals and the Supreme Court. See *In Matter of*

Guardianship of Eberhardy, 102 Wis. 2d 539, 550, 307 N.W. 2d 881 (1981) and *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 442, footnote 9, 531 N.W. 2d 606 (Ct. App. 1995). By statute, appellate frivolity was placed within the appellate jurisdiction of the Court of Appeals, while the Circuit Courts were assigned the adjudication of trial court frivolity matters. Had the trial court's appellate frivolity determination been affirmed, the Court of Appeals would have approved an unconstitutional usurpation of the authority of the Court of Appeals by the trial court.

After reviewing the authorities cited by Mr. Morters,[10] the Court of Appeals with alacrity concluded that the trial court had no authority to make an appellate frivolity assessment. *Morters*, 2006 WI App. 46 at par. 9-10. (App. A5-7) The Court concurred that Sec. 809.25(3) and 809.01(4) required the Court of Appeals or Supreme Court to make an appellate frivolity finding. *Morters*, 2006 WI App. 46 at par. 9-10. (App. A5-7) The Court recognized that it did not make any appellate frivolity finding in its previous decision. *Morters*, 2006 WI App. 46 at par. 10. (App. A6-7) No appellate frivolity motion had been made at the appellate level, and this was not a situation where the Court had considered the matter *sua sponte*. *Morters*, 2006 WI App. 46 at par. 10-11. (App. A6-7) The Court agreed with Ronald that the *Richland County* case was distinguishable because the appellate court had instructed the trial court to assess appellate fees. *Morters*, 2006 WI App. 46 at par. 14. (App. A8) Since the issue was quickly disposed of based on the aforementioned grounds, the Court did not refer to the numerous other authorities presented by Ronald.

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[10] (App. J1-18)

Secs. 809.25(3) and 809.01(4), a wealth of Wisconsin case law, and the aforementioned provisions of the Wisconsin Constitution all showed that the appellate fee request had no reasonable legal basis. *Even a cursory review of such authorities would have informed Aiken & Scoptur and the trial court that their request was improper.* Although the trial court claimed to have reviewed the entire file before rendering its decision,[11] the thoroughness of its analysis is highly suspect given the weight of authority supporting Ronald's position. When given one last chance to correct itself, the trial court ignored black letter law and denied reconsideration. (App. F1-2) In light of the overwhelming authority favoring Ronald's position, this matter should have been remanded for frivolity consideration. The failure to do so constitutes a clear violation of Mr. Morters' right to due process of law.

D. Discriminatory Treatment of Mr. Morters

Unfortunately, the Court of Appeals' failure to remand and the Supreme Court's failure to rectify such error is consistent with the pattern of discrimination Ronald has faced throughout the litigation against his former attorneys. In the trial court frivolity proceedings against Attorney Barr, the fact that Barr could not have been responsible for any jury trial deprivation because he had been previously discharged was found to be critical to the frivolity determination. (App. N2) Ronald, however, had some evidence showing that the delay caused by Barr's unauthorized adjournment agreement led to internal friction between the Morters which ultimately forced Ronald to arbitrate.

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[11] (App. B3)

In Wisconsin, the test for whether negligence is causal is whether that negligence was a substantial factor in causing the injuries. *Merco Distributing Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis. 2d 455, 458, 267 N.W. 2d 652 (1978). Under the substantial factor concept of causation, there may be several substantial factors contributing to the same result. *Sampson v. Laskin*, 66 Wis. 2d 318, 326, 224 N.W. 2d 594 (1975). According to *Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 353-354, 195 N.W. 2d 602, 198 N.W. 2d 161 (1972), the negligent act need not be the sole factor, the primary factor, but only a substantial factor in causing the injury.

Under the substantial factor concept of causation, Ronald's jury trial deprivation claim against Barr had some legal basis. While there was some nexus between Barr's behavior and the loss of the jury trial, the link was simply not strong enough to constitute a substantial factor. A claim is not frivolous merely because there is a failure of proof. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 243, 517 N.W. 2d 658 (1994). *A claim is also not frivolous merely because it was later shown to be incorrect or because it lost on the merits. Stern*, 185 Wis. 2d at 243-244. Frivolousness exists only when there is no reasonable basis for a claim. *Estate of Bilsie*, 100 Wis. 2d at 350.

On a claim which had some legal basis, a frivolity determination was made and Ronald was sanctioned by a successor judge shortly after being assigned to the case. (App. O2) The original trial judge never made any frivolity finding. In comparison, Aiken & Scoptur made a frivolity request having absolutely no basis, and in fact, being directly contrary to black letter Wisconsin law, yet they escaped sanction. Such situation does not constitute equal protection of law, but exemplifies discriminatory treatment favoring Ronald's former attorneys.

When Ronald appealed from the trial court's frivolity determination in Barr, he presented numerous arguments demonstrating trial court error. Rather than conducting a de novo review of the matter as required by Wisconsin law, the Court of Appeals' affirmance of the trial court's decision was based on "reasoning" consisting of one paragraph of conclusory assertions. (App. Q4) The fiduciary responsibility accompanying its position as an appellate court demanded far more in the way of analysis by the Court.

In commenting on Ronald's mitigation arguments, the Court adopted a particularly hostile tone noting that "... Morters argument indicates that he has not learned his lesson regarding the development of a solid argument to support his claims." (App. Q5) The Court was more concerned about criticizing Ronald rather than affording him appellate review and viewed him as a trouble maker. Persistent litigants who are willing to fight for their rights, however, should not be perceived as trouble makers and penalized for standing up for their rights.. History is replete with examples of "trouble makers" who have brought about positive change by refusing to acquiesce to deprivations of their rights.

After the Wisconsin Supreme Court refused to review such decision, Ronald argued to this Court in Petition for Certiorari No. 03-369 that the Wisconsin courts effectively deprived him of his constitutional rights to due process and equal protection of the law by denying him a de novo appellate review. In its November 17, 2003 order, the U.S. Supreme Court denied certiorari.

This latest instance of denial of due process to Ronald is certainly consistent with its earlier disregard for such right. Had the Wisconsin Supreme Court rectified this previous due process violation, the lower courts would

certainly have exhibited more respect for due process and equal protection in future proceedings.

Following the denial of certiorari, Mr. Morters realized that he had been improperly advised of cause to proceed against Attorney Barr. Based on such improper advice to litigate and two other grounds, Ronald moved for relief from the $10,000.00 frivolity assessment against him pursuant to Sec. 806.07(1)(h). This statutory section provides for relief from judgment for "any other reasons justifying relief from the operation of the judgment."

In adjudicating the motion, the trial court failed to address any of the grounds presented by Ronald and treated the request as an attempt to relitigate the whole matter. (App. R2-3) In his appeal, Ronald argued that his due process rights had been violated by the lower court's failure to address his reasons for relief and analyze them in accordance with the case law standards for the evaluation of Sec. 806.07(1)(h) motions set forth in *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 363 N.W. 2d 419 (1985). The Court of Appeals seemed unconcerned with this failure to afford due process. (App. S2-3) The Wisconsin Supreme Court denied review. In Petition for Certiorari No. 04-1621, Mr. Morters brought this matter to the attention of this Court, but certiorari was denied.

After two previous denials of due process to Ronald, the Wisconsin courts' latest deprivation of his due process right should come as no surprise. When due process and equal protection violations remain unchecked, they tend to recur with an even greater frequency.

Additional evidence of favoritism towards Mr. Morters' former attorneys is furnished by the Court of Appeals' reversal of the trial court's nonfrivolity determination in the Aiken & Scoptur case. In *Juneau County v. Courthouse Employees*, 216 Wis. 2d 284, 296, 576 N.W. 2d 565 (Ct.

App. 1998), aff'd, 221 Wis. 2d 630, 585 N.W. 2d 587 (1998) and *Kelly v. Clark*, 192 Wis. 2d 633, 659, 531 N.W. 2d 455 (Ct. App. 1995), the Court of Appeals held that a claim which can be determined only after research and deliberation is not frivolous. Consistent with those standards, the trial court determined that the action against Aiken & Scoptur was not frivolous. (App. M2-4)

The trial court understood the complexity of this case which required an extensive examination of case law and a review of several appeals. (App. M4) Evidence of the complexity of this lawsuit is furnished by the fact that the Court's summary judgment decision consisted of twenty-seven pages, with 157 footnotes and numerous citations to case law. (App. L1-7, M4) The trial court recognized the difference between frivolity and lack of success on the merits. (App. M2)

In reversing the lower court's decision, the Court of Appeals ignored the aforementioned standards. Because Judge Kieffer determined that Mr. Morters had consented to arbitrate, the Court of Appeals concluded that a reasonable litigant should have known the filing of a claim against Aiken & Scoptur was without any reasonable basis in law or fact. (App. C10) *There was, however, no controlling case law or other legal authority from which Mr. Morters should have concluded that such claim had no legal basis.* The trial court, in fact, had determined that there was a genuine issue as to whether Ronald had consented to the arbitration. (App. C5, L2)

Under Wisconsin law, the issue on a frivolity adjudication *is not whether a party can or will prevail but whether the party's position is so indefensible that it is frivolous and the party should have known it. Stoll v. Adriansen*, 122 Wis. 2d 503, 515, 362 N.W. 2d 182 (Ct. App. 1984). In its brief three sentence "analysis" of the frivolity issue, the Court of Appeals presented no legal analysis as to why

Ronald's claim was indefensible. (App. C10) While the Court may have been alluding to issue preclusion, it never conducted the issue preclusion analysis required by *Michelle T. v. Crozier*, 173 Wis. 2d 681, 495 N.W. 2d 327 (1993). Sanctioning one party excessively for pursuing a claim which had some legal basis but allowing the opponent to escape penalty for making an utterly baseless request does not constitute equal protection of law.

Outright favoritism toward Ronald's former attorneys and excessive concern for their protection can be seen in the public policy discussion in the trial court's summary judgment decision in the Aiken & Scoptur case. Judge White concluded that public policy *strongly favored* the preclusion of Morters' claims. (App. L4) In the Court's opinion, allowing such action to proceed would open the door to future actions by claimants dissatisfied with their arbitration awards and could effectively chill a lawyer's representation. (App. L4) The Court also expressed concern about fraudulent claims against attorneys by litigants unsatisfied with their awards. (App. L6)

Since that same Court determined that there was a genuine issue as to whether Ronald had agreed to arbitrate, a protective attitude toward attorneys who violated their client's instructions was very strange. (App. L2) Noticeably absent was any concern for a possible violation of Wisconsin Supreme Court Rule 20:1.2 which requires a lawyer to abide by the client's decisions concerning the objectives of representation and whether to accept a settlement offer. Public policy cannot support actions that conflict with an attorney's professional responsibilities.

Discriminatory treatment of Mr. Morters was apparent even in the earlier stages of the litigation. In his appeal from the trial court's grant of partial summary judgment and

directed verdict in the Barr case, the Court of Appeals affirmed those determinations and then adjudicated the appeal to be frivolous due to serious deficiencies in his appellate brief prepared by previous counsel. (App. O2, 5-7) After Mr. Morters pointed out the difference between appellate frivolity and deficient briefing and the Court's failure to make the requisite statutory findings for appellate frivolity, the Wisconsin Supreme Court vacated the determination and remanded the issue for reconsideration. Reluctantly, the Court of Appeals found the appeal to be nonfrivolous but still insisted on sanctioning Mr. Morters for his attorney's deficiencies pursuant to the statutes pertaining to appellate rules violations. (App. P1-2) While quick to punish Ronald, the Wisconsin courts refuse to allow him an equivalent opportunity to seek redress for Aiken & Scoptur's baseless appellate frivolity request.

A final example of the unequal treatment of Mr. Morters in the Wisconsin courts is furnished by the proceedings in his initial appeal from Judge Kieffer's fee assessment in favor of Barr and Aiken & Scoptur. As part of its May 5, 1999 decision affirming the award, the Court of Appeals ruled that Ronald did not have standing to challenge the award.[12] (App. T4-5) Later, the Court used that same adjudication *which Ronald could not challenge* as grounds for finding his lawsuit against his former attorneys to be frivolous. (App. C10) Throughout this litigation, the Wisconsin courts have been preoccupied with protecting Ronald's former attorneys but have shown no regard for his right to due process of law.

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[12] The Wisconsin Supreme Court declined to review this matter, and Ronald's petition for certiorari designated as No. 99-620 was denied by the United States Supreme Court.

E. The Need for Supreme Court Review

In *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), the Court recognized that it has no supervisory jurisdiction over state courts and its review of state judgments is confined to evaluating them in relation to the Federal Constitution. An analysis of the actions of the Wisconsin courts in relation to the Equal Protection and Due Process Clauses is precisely what this case involves.

According to Supreme Court Rule 10(c), one consideration for granting a writ of certiorari is when a state court has decided an important question of federal law in a way that conflicts with relevant decisions of the Supreme Court. A deprivation of due process certainly presents an important question of federal constitutional law, and the actions of the Wisconsin courts herein conflict with the Supreme Court's prohibition against arbitrary action as set forth in the *Wolff* and *Nebbia* cases. Without respect for due process, the whole fabric of the legal system will ultimately deteriorate.

Given the utterly baseless nature of Aiken & Scoptur's appellate fee request, no logical reason existed for failing to remand this matter for frivolity consideration. Since Wisconsin law clearly prohibited an appellate frivolity adjudication by a trial court, *there is also a genuine issue as to whether the request was made purely for the purpose of harassing Mr. Morters* with callous indifference to the law.

The denial of equal protection of law herein also presents an important question of federal law which warrants the granting of certiorari. By virtue of Sec. 814.025 and its successor, Sec. 802.05, Wisconsin created a facially neutral system for dealing with trial court frivolity. Laws which are nondiscriminatory on their face, however, may be applied in such a way as to violate the Equal Protection Clause. See concurring opinion of Justice

Douglas in *Furman v. Georgia*, 408 U.S. 238, 257, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

The foregoing discussion has shown that Wisconsin's trial court frivolity law has been applied unequally by the Wisconsin courts. While Ronald was penalized for pursuing claims against Barr and Aiken & Scoptur which had some factual and legal foundation, Aiken & Scoptur were allowed to escape sanction for a baseless fee request. Only after Aiken & Scoptur's behavior reached the point of flagrant disregard of clear Wisconsin law did the Court of Appeals intervene to correct it. Their behavior warranted sanctions as well. Such treatment, along with the other instances of due process deprivation discussed herein, show a pattern of invidious discrimination against Ronald violative of his right to equal protection of law.

Since the lawsuits against Barr and Aiken & Scoptur involve the behavior of attorneys, the Wisconsin Supreme Court's denial of review is particularly alarming. As the State's highest court, the Wisconsin Supreme Court is charged with the supervision of the State's lawyers. See Wisconsin Supreme Court Rules 10.01 and 11.01. When an attorney undertakes a baseless legal action against its former client, the Supreme Court should have been interested in reviewing the case in conjunction with the fiduciary responsibility of its regulatory role. Instead, the Court's latest inaction is consistent with its previous pattern of indifference to procedural process and favoritism towards particular attorneys.

Because of the continuous disregard of Fourteenth Amendment rights resulting in forced appeals, this case has become *sui generis* and requires the Supreme Court's intervention. While the Court may perceive this case as purely a

matter of state law, the denial of procedural due process and equal protection of law should be of utmost concern to this Court regardless of the venue. When the state courts fail to protect these constitutional rights, the Constitution demands that the United States Supreme Court must act. Otherwise, the legal system will become plagued by arbitrariness, capriciousness, inequality, and favoritism. Constitutional rights will degenerate to a canard level, and the people of the United States will suffer great harm.

Although the factual history surrounding this litigation is lengthy and complicated, the case provides an excellent forum for the Court to remind the lower courts of the importance of respecting Fourteenth Amendment rights. The process in question, i.e., the frivolity procedure, is clear, the litigant had a claim well within the parameters of that process, and the state courts denied access to that process. The denial of due process is readily apparent.

In his First Inaugural Address on March 4, 1801, Thomas Jefferson discussed the importance of equal justice to all and the freedoms provided by the Constitution and warned " . . . should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety." See *Bartlett's Familiar Quotations*, p. 472, 14th Edition (1968). Since the Wisconsin courts have strayed from the course of upholding due process and equal protection of law, it is now necessary for the United States Supreme Court to direct them onto the right path by granting certiorari in this case.

CONCLUSION

By declining to rectify the Court of Appeals' inexplicable failure to remand the appellate fee request for frivolity

consideration, the Wisconsin Supreme Court has approved a deprivation of Mr. Morters' Fourteenth Amendment rights to due process of law and equal protection under the law. It is clearly repugnant to a Constitution which guarantees such rights that the courts of any State can trample on them without a check. As the ultimate guardian of Constitutional rights, it now becomes the responsibility of the United States Supreme Court to remedy this violation by granting certiorari in this case. A decision herein will not only benefit Mr. Morters but will send a message that due process and equal protection of law must be protected at all levels throughout this Nation. For the reasons recited in this petition, Ronald W. Morters' petition for writ of certiorari should be granted and it is respectfully requested that the Court grant the same.

Dated at Big Bend, Wisconsin, this 1st day of September, 2006.

Respectfully submitted,

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APPENDIX A

712 N.W.2d 71

2006 WI APP 46

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2005AP703

†Petition for Review filed

Complete Title of Case:

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,†

v.

AIKEN & SCOPTUR, S.C., TIMOTHY J. AIKEN, PAUL J. SCOPTUR AND KELLY I. CENTOFANTI,

DEFENDANTS-RESPONDENTS.

Opinion Filed:	February 14, 2006
Submitted on Briefs:	January 3, 2006
Oral Argument:	___
JUDGES:	Wedemeyer, P.J., Fine and Curley, JJ.
Concurred:	___
Dissented:	___
Appellant ATTORNEYS:	On behalf of the plaintiff-appellant, the cause was submitted on the briefs of *Ronald W. Morters, pro se,* of Waukesha.
Respondent ATTORNEYS:	On behalf of the defendants-respondents, the cause was submitted on the brief of *Gutglass, Erickson, Bonville, Seibel & Falkner, S.C.* by *Paul R. Erickson* of Milwaukee.

COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP703 **Cir. Ct. No. 2001CV4476**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

RONALD W. MORTERS

PLAINTIFF-APPELLANT,

v.

AIKEN & SCOPTUR, S.C., TIMOTHY J. AIKEN, PAUL J. SCOPTUR AND KELLY I. CENTOFANTI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Reversed in part and affirmed in part.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Ronald W. Morters appeals, *pro se,* from a judgment ordering him to pay $27,943.11 in frivolous costs to Aiken & Scoptur, S.C., *et al.* Morters contends that the trial court erred in including in that award $17,820.02, which was incurred in the appellate proceedings of this case. Morters also contends that Aiken & Scoptur failed to mitigate its damages. Because we conclude that the trial court had no authority to make a finding that the appellate proceeding in this case was frivolous, or award costs related to the appellate proceedings without a directive from this court to do so, we reverse that portion of the judgment. Because we conclude that the trial court did not err in its assessment of the costs and fees related to the trial court proceedings, we affirm that portion of the judgment. We also affirm the trial court's determination on the issue of mitigation.

BACKGROUND

¶2 This case has generated a series of litigation, including appeals. The factual background has been fully set forth in this court's 2004 decision in this matter. *See* ***Morters v. Aiken & Scoptur, S.C.,*** No. 03-1437, unpublished slip op. (WI App Mar. 16, 2004). Thus, we set forth only those facts necessary for resolution of the instant appeal.

¶3 In the aforereferenced decision, we affirmed the trial court's grant of summary judgment dismissing Morters's claims against Aiken & Scoptur for legal malpractice and breach of contract. Morters claims that Aiken & Scoptur deprived him of a jury trial when it submitted

his personal-injury claim to arbitration without his consent.[1] The trial court found that Morters could not prove two elements of the legal malpractice claim and that claims relating to the arbitration had already been litigated in other proceedings.

¶4 After the trial court's decision, Aiken & Scoptur filed a motion seeking attorneys' fees and costs based on the frivolous claim statute, Wis. Stat. § 814.025(3)(b) (2003-04)[2]. The trial court denied the motion, finding that Morters's claim was not frivolous.

¶5 Morters filed an appeal with this court challenging the trial court's summary judgment decision. Aiken & Scoptur cross-appealed, challenging the trial court's decision on its frivolous claim. We affirmed the trial court's decision granting summary judgment on the grounds that Morters's claims against Aiken & Scoptur were barred by the doctrine of claim preclusion. We reversed the trial court's decision on the frivolous claim statute and remanded the matter to the trial court to conduct a hearing to determine reasonable attorneys' fees and costs.

¶6 On remand, the trial court determined reasonable attorneys' fees and costs related to both the trial court proceedings and the appellate court proceedings. It did so, based on the reasoning that if the claim was frivolous from the moment it was filed, then costs and fees should be awarded for all matters generated from that claim until the case was complete, including any appellate matters.

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[1] Morters's personal-injury claim arose from a car accident, wherein Morters, his wife, and his granddaughter were injured.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The trial court ordered Morters to pay Aiken & Scoptur $10,123.09 related to the trial court proceedings, and $17,820.02 related to the appellate court proceedings.[3]

¶7 A motion for reconsideration was filed, challenging the trial court's authority to make a frivolous award for appellate proceedings without any directive from the court of appeals or finding by the court of appeals that the appellate proceedings were frivolous. The trial court denied the motion. Judgment was entered. Morters now appeals.

DISCUSSION

A. *Frivolous Appeal Costs.*

¶8 Morters's first argument is that the trial court was without authority to order him to pay costs and fees related to the 2004 appeal in this case on the basis that the underlying claim was frivolous. He argues that the law in this state requires an appellate court to determine that an appeal is frivolous before a trial court can award a litigant to pay costs and fees associated with that appeal. We agree with Morters, and therefore reverse that portion of the judgment requiring him to pay $17,820.02 for appellate frivolity costs and fees.

¶9 WISCONSIN STAT. § 809.025(3) provides guidelines relative to this issue. It states in pertinent part:

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[3] The trial court also ordered two of Morters's former trial attorneys to pay frivolous costs to Aiken & Scoptur for their portion of the trial court proceedings. Neither of these attorneys have challenged the trial court's assessment and therefore we need not address their portion of the judgment in this appeal.

> FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief.
>
> . . . .
>
> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶10 These statutory sections require "the court" to make findings. "The court" as used in this statute, refers to the court of appeals or the supreme court. *See* WIS. STAT. § 809.01(4). Therefore, the trial court cannot make a finding that an appeal is frivolous. The authority for such a finding is vested with the appellate court. It is undisputed in this case that this court did not make any findings as to whether Morter's 2004 appeal was frivolous. Aiken & Scoptur did not make a motion requesting such a

finding at any time during the 2004 appellate proceedings. The issue of frivolity of the last appeal was never raised until the matter was back in the hands of the trial court.

¶11 Aiken & Scoptur argue, nonetheless, that it is implicit in the record that Aiken & Scoptur would pursue frivolous costs at all stages of the proceeding provided their cross-appeal in the 2004 appeal was successful. We cannot agree. Although it is true that this court can *sua sponte* find an appeal to be frivolous, that is not what occurred here. There was no discussion at all in the 2004 appeal in this court that that appeal was frivolous. Aiken & Scoptur did not make a motion seeking such finding and this court did not make that finding on its own.

¶12 The Wisconsin Supreme Court recently addressed the issue of appellate frivolity in ***Howell v. Denomie,*** 2005 WI 81, ¶¶16-21, 282 Wis. 2d 130, 698 N.W.2d 621. In that case, our supreme court held that if an appellate court makes a finding that an appeal is frivolous, it is required to give the parties notice that it is considering the issue and *must* afford the parties "an opportunity to respond to the issue before a determination is made." ***Id.***, ¶17. In the instant case, that never occurred.

¶13 Aiken & Scoptur argue that Morters was afforded an opportunity to respond to its request for appellate costs on the basis that the appeal was frivolous during the trial court proceedings. Such does not change the fact that Morters was not afforded the opportunity to respond at the appellate level during the 2004 appeal. Nor does it change the fact that the authority for finding an appeal to be frivolous rests with the appellate court, not the trial court.

¶14 Aiken & Scoptur also contend that the trial court has the authority under WIS. STAT. § 814.025 to order Morters to pay all costs and fees based on frivolous claims for the entire proceeding, including any necessary appeals. It cites ***Richland County v. DHSS***, 146 Wis.2d 271, 279-80, 430 N.W.2d 374 (Ct. App.1988), to support this proposition. We reject this contention. The facts in ***Richland County*** are very different from those in this case. In ***Richland County***, the appellate court specifically directed the trial court to award fees associated with the appeal. ***Id.*** at 278-80. In the instant case, this court never addressed the issue of appellate frivolity. We were never asked to, nor did we deem it necessary to *sua sponte* consider the issue. Accordingly, ***Richland County*** does not control the instant matter.

¶15 Based on the foregoing, we conclude that the trial court was without authority to order Morters to pay frivolous costs and fees associated with his 2004 appeal in this matter. Accordingly, that portion of the judgment ordering him to pay $17,820.02 is hereby reversed.

B. Trial Court Frivolous Award / Mitigation.

¶16 Morters's second argument is that the trial court erred in the amount awarded as frivolous costs and fees associated with the trial court proceedings. He contends that Aiken & Scoptur failed to mitigate their damages. We cannot agree.

¶17 In reviewing a trial court's award of attorneys' fees and costs, we apply a mixed standard of review. ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 575-76, 597 N.W.2d 744 (1999). A trial court's factual findings will not be disturbed unless clearly erroneous. ***Id.*** at 575.

However, whether the award was reasonable is a question of law. ***Id.*** at 576. Because the trial court is in a superior position to assess the quality of the work, and to observe all of the actions taken from the beginning of the case until the end, we give weight to the trial court's determination on reasonableness. ***Id.*** at 575-76.

¶18 The record reflects that the trial court invited the parties to submit evidence, reviewed everything that was in the file, and reviewed all of the billing statements. The trial court concluded that: "The fees and costs incurred by the defendants in the circuit court before the appeal were reasonable and necessary in defense of a frivolous action." The trial court rejected Morters's assertion that Aiken & Scoptur "were sitting back and running up a large bill." The trial court indicated that it saw "no evidence of churning, duplication or unnecessary procedures or effort in bills incurred during this first sta[g]e of the litigation. . . ."

¶19 The trial court went on to address whether the fees were reasonable. It concluded that there was a "good reason for the defendants' attorneys to do what they did." In reviewing this matter, we cannot conclude that the trial court's findings were clearly erroneous or that its determination was unreasonable. We agree with the trial court's assessment that the costs and fees incurred at the circuit court level were necessary, reasonable and did not demonstrate an attempt to "run[] up a large bill."

¶20 Morters argues that Aiken & Scoptur should have, and could have, mitigated the expenses it incurred at the trial court level by filing its motion asserting frivolousness earlier – before it conducted discovery and before it filed its motion seeking summary judgment. We are not

convinced that such action would have been successful or reasonable. A party may subjectively believe that its opponent's conduct is frivolous, but hold off on filing a motion alleging such until it has objective evidence to support such a motion. It appears that this was the course taken by Aiken & Scoptur here. In fact, their first motion seeking a finding of frivolousness was rejected by the trial court. If they lost the original motion *after* the granting of summary judgment, it is improbable that the same motion made at an earlier time would have been successful.

¶21 Finally, Morters argues that the trial court should have imposed the frivolous sanction solely on his former trial attorney, as opposed to splitting the costs equally between the attorney and himself. Although this court can understand Morters's position, we cannot overturn the trial court's determination in this regard. The trial court considered the pertinent facts and reached a reasonable determination. Its decision for splitting the fees and costs was sound and cannot be overturned by this court.

¶22 Based on the foregoing, we affirm the trial court's decision with respect to the reasonableness of the costs and fees associated with the trial court proceedings, and we affirm its decision denying Morters's assertion that Aiken & Scoptur failed to mitigate its damages. Accordingly, those portions of the judgment are affirmed.[4]

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[4] Aiken & Scoptur have filed a motion seeking frivolous costs for the 2004 appeal, the remand proceedings, and the current appeal. We deny the motion for the reasons set forth in the body of this opinion. The only frivolous cost award that remains is the $10,123.09, which was awarded by the trial court and affirmed by this decision. Morters has also filed a motion seeking frivolous costs, alleging that Aiken &

(Continued on following page)

By the Court. – Judgment reversed in part and affirmed in part.

Scoptur's motion was frivolous. We deny Morters's motion as well. *Finisque ab origine pendet.* (The end hangs from the beginning.)

APPENDIX B

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

-vs-

CASE NO.
01CV004476

AIKEN & SCOPTUR, S.C., ET AL,

Defendants.

JANUARY 7, 2005 THE HON. RICHARD J. SANKOVITZ
DECISION Circuit Judge Presiding, Br. 29

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

NICHOLAS C. ZALES
Attorney at Law
Appearing for the Plaintiff.

PAUL R. ERICKSON
Attorney at Law,
Appearing on behalf of the Defendant.

ROBERT SUTTON
Attorney at Law,
Appearing pro se

CAROLYN LEVERANCE,
Official Reporter

[2] PROCEEDINGS:

THE CLERK: 01CV4476, Morters versus Aiken and Scoptur. Your appearances.

MR. ZALES: Attorney Nick Zales appearing on behalf of myself and Mr. Ronald Morters, the plaintiff, who is here in person.

MR. ERICKSON: Paul Erickson appearing on behalf of the defendants.

MR. SUTTON: Robert Sutton appears for himself.

THE COURT: Anything we need to put on the record before I render my decision on the pending motions?

MR. ERICKSON: Not by me.

MR. SUTTON: I have nothing.

MR. ZALES: No, Your Honor.

THE COURT: Thank you. My assignment from the Court of Appeals is to determine the reasonable fees and costs associated with the Court of Appeals finding that this action by Mr. Morters is frivolous under section 814.025. The Court of Appeals has already determined that, and I quote to paragraph 19 of the opinion, Morters and his attorney should have known that there was no reasonable basis for the claims because Morters had consented to arbitration. In other words the Court of Appeals has determined that the action was frivolous, and that's not a matter for me to debate or dispute or further delineate at [3] this point.

Section 814.025 authorizes attorneys fees incurred as a result of the filing, I underscore the word filing, of the action and everything that follows with regard to which it was reasonable for the defendants to incur fees and costs.

And I need not make a separate finding as to each separate incremental step in the process that led from finding – I should say filing to this point today.

Those individuals steps to the extent that they are individually frivolous or baseless are more appropriately dealt with by section 802.05 which permits sanctions for discrete filings that are frivolous in an amount incurred because of the filing of that pleading, motion or other paper. That distinction is one that I'll visit again at the end of this decision.

I'll make the following findings of fact. I invited the parties to submit evidence but the parties declined, other than what I received from Mr. Erickson in the way of his firm's bills, and no one asserted the need for an evidentiary hearing. I have reviewed everything that's in the file. I don't think that's – I don't need to conduct a separate evidentiary hearing to consider what is in the file itself.

Mr. Sutton filed this action on behalf of [4] Mr. Morters, and the defendants began incurring attorneys fees on June 6, 2001. Mr. Sutton moved to withdraw after the defendants moved for summary judgment. It appears from the billing records that the defendants ceased having to deal with Mr. Sutton as of May 7, 2002 and the very next day began dealing with Mr. Zales and Mr. Morters.

At the time Mr. Zales came on board he had had, and I emphasize had had, a chance to review the file and to talk to Mr. Morters. Rather than concede the summary judgment motion Mr. Morters and Mr. Zales opposed it. Mr. Zales represented Mr. Morters in all the proceedings in the circuit court, but not in the Court of Appeals or in the higher courts to which Mr. Morters turned. Mr. Morters represented himself in all the appellate proceedings. I'll

note parenthetically that Mr. Zales may have been advising Mr. Morters about the proceedings in the appellate courts. It appears from the pleading, or at least it appears to Mr. Erickson from the pleadings that Mr. Morters was advised by some attorney, but the extent that that creates a liability for anybody or there is any legal action that's necessary as a result of such consultation that's a matter for Mr. Morters to take up with those who advised him, and that can be done separately.

The last billing entry for the circuit court proceedings was May 16, 2003.

[5] Mr. Zales has represented Mr. Morters in connection with the proceedings here in the circuit court on remand. The first entry in the defendant's billing records for the proceedings upon remand was August 9, 2004 and the last billing entry that I have in the evidence before me is September 9, 2004.

The billing records demonstrate that the defendants expended fees and costs on tasks in the circuit court before the case was appealed that fall into nine categories: Communicating with the clients about the status and strategy of the litigation. Reviewing the background of the litigation. Answering the complaint. Making required court appearances. Preparing one set of requests to admit and interrogatories. Moving for summary judgment which entailed reviewing the record. Conducting legal research and briefing. Moving to quash discovery until the summary judgment motion was decided. Securing the judgment. And moving the court to find the action frivolous which included the initial motion as well as a motion to reconsider.

The billing records demonstrate that the defendants expended fees and costs on tasks in the court of appeals and in higher courts that fall into five categories: Determining whether and what the cross-appeal. Mr. Morters took the first step in the appellate courts. [6] Preparing the record. Conducting legal research, briefing and response to Mr. Morters' motions and petition.

The billing records demonstrate that the defendants have expended fees and costs in this court on remand that fall into four categories: Communicating with the clients about the status of the litigation, researching and requesting substitution, making required court appearances and commencing discovery.

I'm going to amend my previous finding. I think that there's a sixth category of the costs and expenses in connection with the appeal that I failed to mention and that was communicating with clients about the status of the appeal.

The defendants expended about 33 hours of billable time on the brief in support of the motion for summary judgment and the affidavit in support, and the defendants expended about nine hours of billable time on the reply. The defendants expended about 35 hours of billable time on brief in support of the motion to find the action frivolous. The defendants expended about ten hours of billable time on the motion for reconsideration. The defendants expended about 66 hours of billable time on the combined opening brief. That's the combination of the brief in opposition to Mr. Morters' appeal – I should say in response to Mr. Morters' appeal as well as the brief in [7] support of the defendants' cross-appeal. The defendants

expended about 15 hours of billable time on their reply brief.

Mr. Morters, Mr. Zales, and Mr. Sutton each explicitly or implicitly asked me to consider their individual financial circumstances in deciding whether an award of fees and costs was equitable. And Mr. Zales went as far as to imply that – I should say so far as to imply that he owns a negative net worth. But none of these individuals provided me with any specific factual information about their ability to pay on which I can make any factual findings.

These are my conclusions. The fees and costs incurred by the defendants in the circuit court before the appeal were reasonable and necessary in defense of a frivolous action. Mr. Zales asserts in not one but three different places in his briefs that the defendants, either asserts or implies, that the defendants were sitting back and running up a large bill. This implication by itself is frivolous. I see no evidence of churning, duplication or unnecessary procedures or effort in bills incurred during this first state of the litigation, that is, the stage that preceded the appeal.

The best way to frame the question about whether the fees were reasonable is was there a good reason for the [8] defendants' attorneys to do what they did. For each of the nine categories I outlined previously I think so. And I think the answer is self-evident. I also believe the amount of time spent by the defendants' attorneys approximates what a reasonably efficient and knowledgeable attorney charging the rates of between $120 and $150 an hour would spend on the projects that are outlined in the bill.

One rough measure of whether the amount of time spent on the summary judgment motion was necessary

likewise with the frivolous motion was that, for example, it took Judge White 27 pages to address some of those issues. That's a long decision by our standards here in circuit court.

Mr. Morters and his counsel quibble over whether it was necessary to propound discovery at the circuit court stage. But I think that propounding discovery in an occasion like this was prudent.

Section 814.025 employs both a subjective and an objective standard; in other words whether the litigant or the attorney knew or should have known that the claim could not be proven. And I think discovery in a case like this which it's been represented to me and without dispute was focused on Mr. Morters' knowledge on whether he consented to arbitration. I think that that was prudent.

[9] Mr. Matters and counsel also quibble with whether the motion to find the matter frivolous should have preceded rather than follow the motion for summary judgment, or perhaps accompanied the motion. In other words that if this was so frivolous they should have just moved for that at the outset. I reject this assertion. The motion could not have proceeded to summary judgment motion. You can't ask a court to find the action frivolous before you ask the court to do something dispositive with that motion. At best the request that the action be found frivolous could have accompanied the motion for summary judgment.

I don't think that would have saved any expenses. In other words I don't think there's anything there for the defendants to mitigate. The course of this litigation starting from the very out – well, not the very outset but at least the tail end of what happened out in Waukesha County in front of Judge Kiefer demonstrates that Mr.

Morters, Mr. Sutton and Mr. Zales all were prepared to go forward in spite of the fact that they cannot overcome the lynchpin fact of this case. That is, that Mr. Morters had consented to arbitration.

Consequently, I believe that whether the defendants moved the court to find the action frivolous at the same time as moving for summary judgment or whether as [10] what happened in actuality the defendants waited until later to make that motion the defendants would have incurred the same amount of fees. I don't think any amount of unnecessary duplicative fees were incurred because that motion came after the court's ruling on summary judgment.

The only other attacks Mr. Morters or his attorneys make on the amount of the fees and the costs claimed by the defendants are attacks that are based on the size of the typeface of Mr. Erickson's bills, and the assertion that the contents of the bills are too vague. I reject both of these contentions. The typeface of the bills was large enough for me to read and I have to wear the reading glasses now.

Furthermore, they were specific enough for me to understand what efforts the defendants' attorneys were making in order to determine whether there was a good reason for those efforts to have been made. The bills weren't a model of the wisdom that some attorneys have learned that the more detailed the billing entry is the more confidence the client can have that his or her money is well spent. But I had a good deal of experience as a litigator reviewing other lawyers' bills when I served as litigation coordinator for a couple large clients, and my experience as a lawyer looking over other lawyers' bills

plus my experience in reviewing bills as a circuit court [11] judge gives me confidence that these bills were detailed enough that I can say with confidence that what efforts were expended here were reasonable.

I believe that the fees and costs incurred by the defendants in the Court of Appeals were in large part reasonable and necessary in the continuing defense of a frivolous action and in pursuit of the fees and costs to which the defendants were entitled under section 814.025.

I'm going to speak at the end of this decision about whether I have the power to award the fees and costs for the efforts in the court of appeals, but at least at this point in my findings – I should say my conclusions of law I think it's appropriate for me to state whether I grant these fees and costs or whether the Court of Appeals decides that they should grant them, and that not all of the fees and costs that the defendants seeks should be awarded, at least on the record I have before me.

I mentioned the rough measure I used before to evaluate the amount of time the defendants put in the summary judgment brief; in other words I compared the amount of time they put in the brief with the length of Judge White's – at least one of Judge White's decisions. A similar rough measure can be applied using the Court of Appeals decision. I will concede off the bat that it's not exactly the same kind of measurement because the Court of [12] Appeals was explicit in this case as they are usually in declining to address several of the issues that were raised by Mr. Morters to which the defendants probably responded. And the fact that the Court of Appeals didn't address all the issues doesn't mean that the defendants could have skipped some of the issues in their brief.

Nevertheless, I do get the sense from the per curiam opinion in this case that the main issue on appeal was not that different than the issue that was presented to this court when Judge White was presiding. Further, the issues that were addressed on the appeal had been addressed to a large degree already in the *Barr* litigation and the underlying action before Judge Kiefer.

In other words based on my own experience as an appellate litigator I would not have expected to have been necessary to expend as much time as the defendants expended on the opening brief in the Court of Appeals. I believe it will be reasonable to reduce the total of the fees attributable to that brief by 25 percent.

Now, I was not presented with the briefs on appeal. They're not part of the file I have here. And if the defendants wish me to revisit this ruling after reviewing those briefs, after submitting them to me and letting me review them, then I may reconsider this decision.

[13] The fees and costs incurred by the defendants in circuit court upon remand were reasonable and necessary in pursuit of the fees and costs to which the defendants are entitled to under section 814.025 with one exception. One of the categories I identified of efforts relating to these proceedings upon remand had to do with the defendants' request for substitution.

Because of the annual August rotation which was generally known in the legal community as early as April of 2004 the defendants should have been aware in August 2004 when the case came back on remand that it would be assigned to Judge White, that it would be assigned to this branch, and I am Judge White's successor. And I think that with that knowledge the defendants would have

realized there was no reason to file – consider filing, prepare, or file or pursue a motion for substitution.

Accordingly, I'm going to reduce the fees and costs owed to the defendants for the work upon remand by $184. In all other respects the billable time expended through September 9, 2004 is reasonable. And its reasonableness is self-evident and I believe undisputed by Mr. Morters and his counsel.

Mr. Morters and counsel asked me to allocate the fees among them. I think I mentioned when we were together previously that I had considered whether or not I can [14] impose these fees jointly and severally. I don't believe the statute allows that to be done. In fact I think Mr. Erickson asked me not to do it. At any rate I have decided it's appropriate to allocate these various costs and fees.

There is no fixed or firm formula for allocating fees and costs between Mr. Morters and his attorneys. Paragraph 19 of the Court of Appeals order clearly suggested that both counsel and client should be held responsible. I considered but couldn't put my finger on any principle that would justify anything other than splitting the bills equally between Mr. Morters and the attorney who was on watch at the time for the portions of the litigation for which they are responsible.

I don't think there is a principle I could cite that could say that Mr. Morters is only 30 percent culpable and the attorney should be held 60 percent culpable or vice versa or any other division. I think that simple fairness would dictate given the long history that preceded the filing of this action that the attorney and the client split this responsibility. Mr. Sutton had a good long time to look at the merits of this litigation before filing it, and Mr. Zales

had sufficient time to look at the merits of this litigation before he decided to prolong it. And I think that everybody, Mr. Morters included, could see how [15] important it was that he consented to arbitration, and how that nullified any chance of prevailing in this litigation.

Accordingly I believe that Mr. Morters and Mr. Sutton should each be responsible for 50 percent of the fees and costs that the defendants incurred from June 6, 2001 until May 7, 2002. Likewise, Mr. Morters and Mr. Zales will each be responsible for 50 percent of the fees and costs that the defendants incurred from May 8, 2002 until May 16, 2003.

Because the proceedings upon remand flow from the instigation of these proceedings with Mr. Sutton at the helm as well as the prolonging of these proceedings with Mr. Zales at the helm, Mr. Morters, Mr. Sutton and Mr. Zales will each be responsible for 33 and one-third percent of the fees and costs that the defendants incurred since August 9, 2004.

That leaves the question of the fees and costs on appeal. To the extent that I award them, I award them all against Mr. Morters reduced as I said before in part for the what I believe to be excessive fees in connection with the opening brief on appeal.

I guess before I get into the question of the appeal fees and costs let me address two other points that were made by Mr. Zales in connection with the fees and costs in the circuit court proceedings. First, Mr. Zales [16] argues that Mr. Sutton should bear all the costs because essentially Mr. Sutton knew the action was frivolous and was jumping ship leaving the first mate at the helm, essentially that Mr. Zales was only defending a client who had been

abandoned. The flaw in this theory is that Mr. Zales had the opportunity to evaluate the litigation and see its frivolousness and do the professionally competent thing which he did not do.

Indeed the Court of Appeals already made the determination that the action was frivolous and that both client and counsel should pay. Following Mr. Zales' suggestion I think would ignore what the Court of Appeals has found.

Further, I think I simply need to remind Mr. Zales that while he may consider his role in coming to Mr. Morters' rescue honorable, it is still a breach of professional duties as stated in the *Riley* case which Mr. Zales has cited to me. "Simple reliance upon one's client is not sufficient and an empty head but a pure heart is no defense." This case is talking about rule 11, but I think that the same sentiment applies to section 814.025. That quote from *Riley* was in turn a quote from the 7th Circuit's decision in *Mars Steel*. The Court in *Riley* went on to say the words were applied in that case to section 802.05, I think also applied to section 814.025. The rule [17] bars a defense of good faith. It instead creates obligations to one's adversaries and to the legal system to avoid needless cost, delay and waste of judicial resources. In particular it mandates an affirmative duty of reasonable inquiry before proceeding with a claim or filing paper.

I can't say that those things applied word for word in specific section 814.025 because they were quoting in large part 802.05. I think that the same sense of an attorney's duty under 814.025 is summed up by those words.

The second argument Mr. Zales makes is that Mr. Sutton should bear all the costs of the circuit court proceedings because his retainer was so much larger, in other words that the fees and costs should be allocated on some kind of an investment basis. I reject those suggestions for three reasons. First the argument implies that fees and costs should be repaid on some basis having to do with the ability to pay. The problem is I don't have the facts necessary to make a determination about the ability to pay of any of these three potential subjects. Furthermore, the argument implies that the retainers were the only fees earned in this matter by either attorney, and that the attorney pocketed all that was paid to him as opposed to using its own money to pay expenses. Likewise, I don't have the facts necessary to make the necessary determination.

[18] Finally, the amount the attorneys invested is essentially irrelevant when you look at this case through the prism of the costs inflicted on the defendants. Mr. Zales may not have been paid as well, but he may have implicated greater costs by choosing to prolong the case rather than counseling Mr. Morters not to proceed.

The most difficult question is to whether award the fees and costs that the defendants spent on appeal. That's where we spent most of our time when we were on the record previously. It's difficult for these reasons. The defendants did not request fees and costs for the appeal, not under Chapter 809 nor under 814.025.

Accordingly, I think the Court of Appeals did not direct me explicitly whether to assess them. My sense is that the reason there is no statement about this issue in the Court of Appeals opinion is because the Court of

Appeals was not presented with the issue. Furthermore, the appeal was not strictly speaking frivolous because it was the defendants, not the plaintiff, who were prosecuting the appeal, at least in part.

Thus the question becomes whether the defendants are barred from seeking the fees and costs of the appeal when it has been remanded to my court. Furthermore, on the surface, at least, it appears that there is conflicting authority as to the power of a circuit court to award the [19] fees and costs associated with the appeal of a frivolous action. There's a host of authority, Mr. Zales cites most of it, that seems to suggest that only the Court of Appeals may determine that an appeal is frivolous and award fees and costs, unless the Court of Appeals explicitly makes the determination that the appeal is frivolous and directs the circuit court to determine the amount.

The *Richland County* case suggests that the purpose of section 814.025 is to make whole the victim of a frivolous action and that should include the costs of the appeal and that the circuit court can determine that amount. The *Wisconsin Chiropractic* case suggests that where a party obtains the reversal of a circuit court order denying fees and costs, the appeal is not frivolous and fees and costs will not be awarded.

So, when I look at the posture of the case given the defendants' failure to ask for fees and costs and the lack of a direction from the Court of Appeals to award fees and costs, when I look at the legal landscape given the conflict of these cases I think I'm left with these choices. I could hold that requesting the fees and costs from the Court of Appeals is a formality that the defendants failed to fulfill; therefore they are barred from seeking it here. I can hold

that the Court of Appeals did not make a finding of frivolousness or otherwise [20] directly to assess the fees and costs of the appeal, and that, therefore, the defendants are barred. I could hold that the fees and the costs of the appeal are a natural byproduct of a frivolous action and hold that they are recoverable along the lines of *Richland County*. In other words, that the defendants are not barred from asking for those fees and costs here. I could hold that the appeal was not frivolous because it was instigated, at least in part, by the defendants and, therefore, under *Wisconsin Chiropractic* the defendants are not entitled to the fees and cost of the appeal.

My last option, I guess, is that I could determine the fees and costs provisionally; in other words the fees and costs that might be reasonable but hold that I have no power to award them absent direction from the Court of Appeals and simply permit the parties to return to the Court of Appeals and have the Court make the requisite finding. This last option is tempting, of course, because given the history of this litigation it would come as little surprise to me or to Mr. Erickson that whatever my order is I will be appealed. I'm not encouraging any appeals and I'm not going to chose option E.

Here's how I come out. The *Richland County* case gets the defendants close to the ruling they seek, but not all the way. Because if you look at *Richland County*, in [21] that case the victims of the frivolous action asked the Court of Appeals to award fees and costs, and the Court of Appeals gave its blessing. And that makes that case contrast with this one.

Wisconsin Chiropractic is not as strong for Mr. Morters as Mr. Morters might believe because the statute at

issue in *Wisconsin Chiropractic* was not 814.025; the statute that was at stake was 809.25. The Court of Appeals in that case in contrast to this one decided whether to exercise it's [sic] own discretion to award fees and costs under the statute governing the frivolous appeals and deliberately declined.

Further, in the *Wisconsin Chiropractic* case the only issue before the court was whether the circuit court erred in refusing to find the underlying action frivolous. There was no cross-appeal, so we don't have the muddy situation we have here, where even if Mr. Erickson's appeal was not frivolous it still might be possible to say that Mr. Morters' appeal was frivolous. And that's a significant distinction.

Finally, there's nothing stated in the *Wisconsin Chiropractic* decision which would have barred the defendants in that case from asking the circuit court on remand to include among the fees and costs under 814.025 the fees and costs of the appeal. In other words, the [22] Court of Appeals was not asked to decide the issue which I am asked to decide here. So, I don't think *Wisconsin Chiropractic* bars me from awarding the relief that Mr. Erickson seeks.

I do think that *Richland County* states the best principle to resolving the case. I'm going to quote from the opinion just so it's clear why I think this is significant. This is starting at page 279 of the Wis. 2d version of the opinion. I guess this is old enough, it doesn't have paragraph numbers. The award of attorneys fees under section 814.025 to the victim of a frivolous action or defense furthers an interest essential to the system of justice. Section 814.025 was intended to deter the commencing or continuing of frivolous actions, to punish those who do so.

The opinion goes on to make a quotation, I'm not going to reference quotations and citations, but I am going to read the content. The trial court must enforce section 814.025 for the purpose of maintaining the integrity of the judicial system and the legal profession. If the victim of a frivolous action or defense may not recover appeal costs and fees the deterrence objective of section 814.025 will be seriously compromised. Like the landlord in *Shands,* the frivolous claimant or defendant could defeat the statutory purpose by the simple expedient of an appeal which may be [23] prohibitively expensive for many litigants. Further, the victim of a frivolous action or defense would be reluctant to appeal the trial court order or judgment denying him or her costs and attorneys fees under section 814.025. To permit recovery of attorney fees for successful appellate work simply recognizes that an attorney's efforts at that stage are as essential to the recovery of an award under section 814.025 as is the attorney's work on the trial court level. To deny attorney's fees to victims of frivolous claims and defenses who need to pursue appellate review to enforce their rights would undercut the salutory objectives of section 814.025.

You see the some [sic] principle stated in the *Riley* case as well in connection with section 802.05. The only reason not to follow *Richland County* and to apply its principle to this case would be that the defendants did not ask the Court of Appeals to make a finding about fees and costs. So, I think what we have here is formality pitted against principle.

I see no reason for siding with formality in this case. There isn't anything substantive that would be accomplished by requiring a finding from the Court of Appeals before making a determination about the appellate fees and costs in this court. If this was an appeal involving

802.05 I might decide differently because 802.05 [24] is more surgical and it might require the Court of Appeals to decide that one aspect of the appeal or another aspect was not frivolous or did not constitute the prolonging of frivolous prosecution, or indeed there might have been an aspect of the appeal that was required of the parties. In other words that they had no choice but to pursue certain aspects of the appeal.

But this case does not involve 802.05. It's a 814.025 case, and the Court of Appeals has made the determination that this case was a dud from the moment it was filed. The appeal was a natural outgrowth of the bad seed of a frivolous filing, and it wouldn't require the judge closest to the point of the infraction, to borrow a football metaphor, to determine that the fees and costs of the appeal should be awarded as part of the overall award to the defendants for having to defend a frivolous action.

This question about whether or not the Court of Appeals should separately judge the frivolousness of the appellate action brings to mind a passage from *The Ring and the Book,* which was a book by Robert Browning, the famous English poet. He's probably more famous for having married Elizabeth Barrett who became Elizabeth Barrett Browning. One passage stood out for me. "White shall not neutralize the black, nor good compensate bad in a man absolved him so, life's business being just a terrible choice."

[25] In my mind this passage helps illustrate that once you file a frivolous action everything that follows from that until the moment that you concede is something that gets included in award of fees and costs. I think that the appeal was a natural outgrowth of that, and I think

that that's something that I can view from my seat on the circuit court, even though I didn't watch the appeal progress. If this hadn't been filed there wouldn't have been an appeal at all, and the defendants would not have had to incur those costs.

This quote I think stands out for me, too, because it refers to the terrible choice that was made that started this off, and the terrible choice, the terrible choice of Mr. Morters to continue an action that was hopeless, the terrible choice of Mr. Sutton to advise him to do so, seeing the importance of one fact that was uncontrovertible, and the terrible choice that Mr. Zales also made to get in and prolong rather than telling Mr. Morters that this was at an end is the terrible choice for which they are held liable under 814.025.

For these reasons I'm going to ask Mr. Erickson to submit an order which provides that Mr. Sutton to pay the fees that I have allocated to him, that Mr. Zales pay the fees that I have allocated to him, and that Mr. Morters pay the fees that are allocated to him for the circuit [26] court proceedings as well as the appellate court proceedings. I have deliberately divided these up by date. So that I didn't have to go through and do all the adding and subtraction, not that I don't mind the chore but it's just that I don't trust my calculator. And that will give the parties an opportunity to review the bills themselves and decide if Mr. Erickson's figures are appropriate. And I'll allow Mr. Erickson to submit that under the five day rule.

Is there anything else we need to place on the record at this point, Mr. Erickson?

MR. ERICKSON: With respect to the 25 percent reduction, while I was listening to you, I was trying to figure out which line items I should apply that to.

THE COURT: The line items that relate to the preparation of the opening brief on appeal, and when I looked at it it totaled up to about 66 hours.

MR. ERICKSON: The total was 66?

THE COURT: 66 hours. Now some of that I assume is your time, most of it was an associate's billing rate at $120 an hour and some of it belonged to a paralegal.

MR. ERICKSON: So 66 less the 25 percent you're talking about?

THE COURT: Right. What I would do is figure out the total fees that related to that bill, cut them by a [27] quarter and submit that.

MR. ERICKSON: It appears that Exhibit C that I prepared, just trying to get some guidance on this reference number is 20 through 28, and 31 through 34 appear to be the preparatory lines.

THE COURT: I don't have it right in front of me. Do you want me to get it?

MR. ERICKSON: That might be the simplest.

THE COURT: I didn't realize your bills had reference numbers on it.

MR. ERICKSON: On the right hand edge there except for the archived items that are referenced. I wasn't

sure if you meant from the moment the appeal started until the end or just the preparation time.

THE COURT: So, you mentioned that the first one is –

MR. ERICKSON: There might been an earlier.

THE COURT: I start with item 19 which also includes the reference: Prepare our response brief, prepare our appellate brief, and it looks like it goes all the way to filing of that brief which was – looks like these records don't go in numerical order.

MR. ERICKSON: They kind of do but they bounce back and forth.

THE COURT: Looking at an entry here on September [28] 23, 2003 –

MR. ERICKSON: You want me to go through the 23rd?

THE COURT: Yes.

MR. ERICKSON: Okay. Thank you.

THE COURT: Anything else?

MR. ERICKSON: No.

THE COURT: Mr. Sutton?

MR. SUTTON: He answered that question.

THE COURT: Okay. Mr. Zales, anything else?

MR. ZALES: Yes. You are declaring Mr. Morters' appeal frivolous then, as a finding of fact that his appeal is frivolous?

THE COURT: I'm not making a separate finding that that appeal was frivolous. I'm certainly not making that finding under section 814.025 because I don't have the authority to do that. What I'm saying is that that was part of the frivolous action that was planted upon the filing of this case. That was part of the prolonging of this frivolous action. That I think that the fees and costs incurred by the defendants in responding to the appeal in addition to all the proceedings here in the circuit court is part of the award that they deserve under 814.025. Does that answer your question?

MR. ZALES: Yes, it does.

[29] THE COURT: Thank you. Mr. Morters?

MR. MORTERS: Yes, Your Honor. The thing that I find most disturbing is that you have stated that we agreed to arbitration.

THE COURT: That is an issue that I'm not going to debate with you at this point. Is there anything about what you need to do at this point forward that I need to discuss on the record?

MR. MORTERS: Can we – you said that we need to provide you with copies of the appeal briefs so that you could review the points of law.

THE COURT: I didn't want to mislead you on that. I was giving Mr. Erickson the opportunity to provide me with those briefs if he wants me to reconsider my decision to cut his bills by 25 percent. But I'm not inviting you to ask me to read those briefs for any other reason.

Anything else we need to put on the record?

MR. ZALES: Well, I just want to mention the Burmeister (sic) case versus Automated Products, December 15, 2004, Wisconsin Supreme Court.

THE COURT: Is this Elizabeth Burmeister (sic)? I only ask to get a spelling.

MR. ZALES: It's 2004 Wis. 148. It's the first time –

THE COURT: Just so we have a clear record, how [30] is the plaintiff's name spelled?

MR. ZALES: Excuse me. Yes. B-A-U-N-E-I-S-T-E-R, *Bauneister versus Automated Products, Inc.* It's the first time the Supreme Court of the State of Wisconsin addressed the issue of how much an appeal has to be frivolous before a court can award frivolous fees.

THE COURT: Well, is the Wisconsin Supreme Court considering the issue or considering some construction of 809.25 or considering 814.025?

MR. ZALES: 814.025, the trial court statute. THE COURT: And you want me to wait for that decision?

MR. ZALES: No, it's already been made. They were taking up another one in couple months on what is necessary in terms of due process and notice to a party. I'm just saying that the essence of the burden of the *Bauneister* decision is that if any part of an appeal is not frivolous then the other side is not entitled to any of the attorney's fees. I just wanted to put that on record and that it be part of the record.

THE COURT: Well, kind of late in the game but I'm interested in making sure this is done right. So, even

though I know it's less painful in this case that we can try to end it here and without another round of the Court of Appeals, I will take that into consideration and I will [31] give you a decision in five days.

MR. ZALES: Thank you, Judge.

MR. SUTTON: For future purposes, then, I would like to make a statement on the record. I do not intend to protract or prolong this litigation myself; I will not be pursuing any appeals of any kind. And what I'm saying is please excuse me from any further sanctions.

THE COURT: I hope there won't be a need for further sanctions. I think that what you stated was wise, not just based on the fact but I think that this is the kind of thing courts expect attorneys to do, so that if we need to draw lines in the future we know where to draw them. And you have made yourself clear.

Anything else?

MR. MORTERS: Yes. I would like you to explain to me why a person who is injured terribly, and with his wife, in a motor vehicle accident is subjected to such a tortuous [sic] trial in attempting to obtain justice in the Wisconsin courts. I mean, we have been nothing but discarded. As far as the justice in this system is concerned we have received zero. I have paid over a half million dollars –

THE COURT: Mr. Morters, is this part of a question or are you now embarking on a statement?

MR. MORTERS: It's part of the question is why.

[32] THE COURT: Why don't you see if you can boil your question down to one question and I'll answer it for you.

MR. MORTERS: Why is my appeal considered as frivolous when I am just exercising my rights under the constitution of the United States and of Wisconsin to pursue all available paths towards obtaining justice?

THE COURT: Mr. Morters, I think you might well appreciate that that is a loaded question and by loaded I don't mean to say anything pejorative about it. What I do mean to say there are so many sub-parts to that question that I would have to explain that would keep some other parties who have been waiting 45 minutes a lot longer to hear their case. I think I can say with some confidence that the answer to your question lies in numerous decisions by the Court of Appeals, and by my brethren and sister on the circuit court. And I'll simply refer you to the previous decisions in the case. Thank you.

(PROCEEDINGS CLOSED.)

* * * *

[33] STATE OF WISCONSIN)
) SS:
MILWAUKEE COUNTY)

I, CAROLYN LEVERANCE, Official Court Reporter in and for the State of Wisconsin, do hereby certify that I reported the foregoing proceedings and that the foregoing transcript, consisting of 33 pages is a true and correct transcript of my original stenographic notes transcribed to the best of my ability at said time and place.

Dated at Milwaukee, Wisconsin, this 18th day of January, 2005.

/s/ Carolyn Leverance
Carolyn Leverance,
Official Reporter

APPENDIX C

272 Wis.2d 855

COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE
This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1437 **Cir.Ct.No. 01CV004476**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

RONALD W. MORTERS

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

AIKEN & SCOPTUR, S.C., TIMOTHY J. AIKEN, PAUL J. SCOPTUR AND KELLY L. CENTOFANTI,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Milwaukee County: Maxine A. White, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Ronald W. Morters appeals, *pro se*, from the trial court's grant of summary judgment in favor of Aiken & Scoptur, S.C., Timothy J. Aiken, Paul J. Scoptur, and Kelly L. Centofanti. Morters sued Aiken & Scoptur for legal malpractice and breach of contract after Aiken & Scoptur submitted his personal-injury claim to arbitration. He claims that the trial court erred when it concluded that his complaint was barred by the doctrine of claim preclusion.[1] We affirm.

¶2 Aiken & Scoptur cross-appeals from the trial court's denial of its motion for attorneys' fees and costs, and denial of its motion for reconsideration. The firm alleges that the trial court erred because Morters's claims were frivolous under WIS. STAT. § 814.025 (2001-02).[2] We agree and reverse and remand for a hearing on attorneys' fees and costs.

I.

¶3 This is the latest in a series of cases stemming from a car accident in which Ronald Morters, his wife, and

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[1] Morters also alleges that the trial court erred when it: (1) granted summary judgment because an issue of fact is in dispute as to whether he consented to arbitration; (2) concluded that his claims were barred by public policy considerations; and (3) concluded that his claims were barred by an arbitration award. Based on our conclusion that Morters's claims are barred by claim preclusion, we will not discuss the remaining issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***Skrupky v. Elbert***, 189 Wis. 2d 31, 47, 526 N.W.2d 264, 270 (Ct. App. 1994) (if a decision on another point disposes of the appeal, we need not decide the other issues raised).

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

his granddaughter were injured. Morters was originally represented by Attorney Charles H. Barr. In 1994, Morters fired Barr and retained the law firm of Aiken & Scoptur. Morters fired Aiken & Scoptur in 1995 because, he claimed, Aiken & Scoptur submitted the case to arbitration without his knowledge or consent. Morters then retained Attorney Willis J. Zick, who ultimately settled the case through arbitration. After the arbitration, Zick retained one-third of the settlement proceeds, pending an allocation of fees and expenses between counsel.

¶4 On August 29, 1997, the Honorable James R. Kieffer held an evidentiary hearing on Barr's and Aiken & Scoptur's request for an order allocating attorneys' fees and expenses. At the hearing, Judge Kieffer determined that the main issue, as relevant to this case, was whether Aiken & Scoptur had a valid, enforceable lien for attorneys' fees or whether Morters had fired the firm for cause. At the conclusion of the hearing, Judge Kieffer found that Morters had not fired Aiken & Scoptur for cause because Morters had agreed to arbitrate his personal-injury claim. He further determined that Barr and Aiken & Scoptur had valid fee agreements and entered an order granting Barr's law firm, Croen & Barr, and Aiken & Scoptur liens for one-third of the Morters' gross recovery.

¶5 Morters appealed, and we affirmed in an unpublished opinion. *See* ***Morters v. Kuenzli,*** Nos. 97-3054, 98-0589, unpublished slip op. (Wis. Ct. App. May 5, 1999). Morters appealed to the Wisconsin Supreme Court, which denied his petition for review. *See* ***Morters v. Kuenzli,*** 228 Wis.2d 172-173, 602 N.W.2d 759 (1999). Morters then tried the United States Supreme Court, which denied his petition for a writ of certiorari. *See* ***Morters v. Croen & Barr,*** 528 U.S. 1046 (1999).

¶6 Morters subsequently filed a lawsuit against Barr for legal malpractice and breach of contract, claiming, among other things, that Barr's representation deprived him of a jury trial. When the claims against Barr were dismissed, Morters filed this action against Aiken & Scoptur for legal malpractice and breach of contract. He claimed that Aiken & Scoptur deprived him of a jury trial when it submitted his personal-injury claim to arbitration without his consent.

¶7 Aiken & Scoptur moved for summary judgment. The firm claimed, among other things, that Morters's action was barred by the doctrine of claim preclusion because Judge Kieffer had decided the same issue at the August 29 hearing, namely, that Aiken & Scoptur was not negligent in submitting Morters's personal-injury claim to arbitration because Morters had agreed to the arbitration submission.

¶8 Morters asserts that summary judgment was inappropriate in this case because he claims that there was an issue of fact as to whether he agreed to arbitrate his personal-injury claim. To support this contention, Morters submitted an affidavit to the trial court in which he claimed that Aiken & Scoptur "remov[ed] my case from being [sic] a jury trial and forc[ed] me into binding arbitration . . . without my knowledge or consent." He further contends that it would be fundamentally unfair to apply the doctrine of claim preclusion because he did not have a full and fair opportunity to litigate his malpractice and breach-of-contract claims at the August 29 hearing.

¶9 As noted, the trial court granted Aiken & Scoptur's motion for summary judgment. In its written decision and order granting the motion, the trial court determined,

however, that "it is clear that the issue of whether Plaintiff agreed to binding arbitration is an issue in dispute." Nonetheless, it concluded that summary judgment was warranted because Morters could not prove the last two elements of a legal malpractice claim – that Aiken & Scoptur's alleged malpractice caused Morters's alleged damages. *See* ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284, 287 (1979) (elements of legal malpractice claim). The trial court also concluded that Morters's allegations were precluded because "claims stemming from the arbitration award," including Morters's current claims, had been litigated in the Barr and Aiken & Scoptur proceedings.

¶10 After the trial court granted the motion for summary judgment, Aiken & Scoptur filed a motion for attorneys' fees and costs on the ground that Morters's claims were frivolous under WIS. STAT. § 814.025(3)(b). The trial court denied the motion, concluding that "although some of the plaintiff's arguments appear to be frivolous, the Court ***cannot*** conclude that the entirety of the case before this Court is frivolous." (Emphasis by trial court.)

¶11 Aiken & Scoptur filed a motion for reconsideration of the trial court's denial of the motion for fees and costs. The trial court denied the motion.

II.

¶12 Our review of the trial court's grant of summary judgment is *de novo,* and we apply the same standards as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-317, 401 N.W.2d 816, 820-821 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. ***Id.***, 136 Wis. 2d at

315, 401 N.W.2d at 820. If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** Wisconsin Stat. Rule 802.08(2) sets forth the standard by which summary judgment motions are to be judged:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A. *Claim Preclusion*

¶13 Under the doctrine of claim preclusion, a final judgment or order is conclusive in all subsequent actions between the same parties or their privies as to all matters which were litigated or which might have been litigated in the former proceedings. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723, 727 (1995). In order for the earlier proceedings to be a claim-preclusive bar in a subsequent action, the following three factors must be present: (1) identity between the parties or their privies in the prior and present suits; (2) identity between the causes of action in the two suits; and (3) prior litigation which resulted in a final judgment or order on the merits by a court with jurisdiction. ***Id.***, 189 Wis. 2d at 551, 525 N.W.2d at 728.

¶14 Morters concedes that the first two elements are met. Thus, the issue before us is whether the record of the August 29, 1997, hearing before Judge Kieffer resulted in a final determination on the merits by a court with jurisdiction. We conclude that it does. The record shows that at

the August 29 hearing Judge Kieffer made specific factual findings on the issue of whether Morters agreed to submit his personal-injury claim to arbitration:

> I conclude in this case that the entire aspects and the pros and cons and the advantages and disadvantages of arbitration were clearly advised or given to Mr. Morters and that there apparently were disputes regarding the apportionment of the negligence to Mr. Morters, but I am satisfied after weighing the testimony in this case that Mr. Morters communicated onto the Aiken & Scoptur firm that he wished to go ahead with arbitration, gave his consent to that, and now after the fact is saying that he did not so consent.
>
> Additionally, I would point out for support in that position is Exhibit No. 5 which is actually part of Exhibit [No.] 6, and that's a handwritten note from Mr. Morters himself. It says as follows: "Arbitration – if you cannot get your first choice judge, which is underlined, I want Judge Zick to arbitrate. I was Plaintiff before him for fraud, and I was very impressed with his fairness and no B.S. manner. Attorney Scoptur said I could have him."
>
> Now, Mr. Morters himself clearly says that this [] phrase[], "If you cannot get your first choice" could be interpreted in different fashions. One in the fashion identified by Mr. Morters is that Mr. Morters would still have a final say-so, that Mr. Morters was talking about in the future if you cannot get your . . . first choice . . . I then want Judge Zick. The Aiken & Scoptur firm says that he – they interpreted this completely different, that this note from Mr. Morters himself was giving the Aiken & Scoptur firm the explicit approval to go ahead with arbitration as had been

> discussed with Mr. Morters prior to that time and that the first choice was in reference to Mr. Greene and that if that wasn't possible that Judge Zick would then be the choice of Mr. Morters to arbitrate. This is a clear example of Mr. Morters again having in his mind one thought process, though not communicating that on clearly to his attorneys of record, to the Aiken & Scoptur firm.
>
> As far as this court is concerned, he was giving extremely mixed messages to counsel, at least mixed messages from himself, and in retrospect, I believe he was giving clear messages to the Aiken & Scoptur firm that he wanted them to go ahead with arbitration, and only after some thought and after the ink had dried on the actual orders approving of arbitration that he then said, "No, I don't want to go ahead with that."
>
> . . . .
>
> I agree completely . . . that this case was put together in a very neat, succinct package which could have resulted in more dollars coming their way than what had been originally offered to Mr. Barr and what [was] eventually offered and received by means of arbitration. That firm, the Aiken & Scoptur firm, did everything they could have done, thus in retrospect, when I look at the reasons that were given by Mr. Morters for allegedly discharging for cause the Aiken & Scoptur firm, I do not believe that it constitutes or is even elevated to the level of being for cause.

¶15 Morters contends that claim preclusion does not apply, however, because, as we have seen, the trial court here did not accept Judge Kieffer's findings as preclusive when, as phrased by Morters in his brief, it "ruled that

there was a genuine dispute as to whether [Morters] had agreed to arbitrate." As noted earlier, however, we decide *de novo* a trial court's grant or denial of summary judgment, and we will affirm if, under the law, the trial court's bottom-line result is correct. ***State v. Marhal,*** 172 Wis. 2d 491, 494 n.2, 493 N.W.2d 758, 760 n.2 (Ct. App. 1992) (we must affirm the trial court when it reaches the right result even if it is for the wrong reason). As we have seen, Judge Kieffer determined that Morters agreed to arbitrate his personal-injury claim, and the order that Judge Kieffer entered as a result was affirmed on appeal. Morters may not relitigate that issue here.

¶16 Morters also argues that Judge Kieffer did not have personal jurisdiction over the attorneys who represented him, Timothy J. Aiken, Paul J. Scoptur, and Kelly L. Centofanti, because they were not named as individual parties to the fee hearing. This argument is without merit. As we have seen, Morters concedes that the individuals were in privity with or privies of the Aiken & Scoptur firm. That is all that is required. ***Northern States Power Co.,*** 189 Wis. 2d at 551, 525 N.W.2d at 728; ***Pasko v. City of Milwaukee,*** 2002 WI 33, ¶18, 252 Wis. 2d 1, 643 N.W.2d 72.

¶17 Finally, Morters appears to argue that it would be unfair to apply claim preclusion because he has a constitutional right to a jury trial on his current claims against Aiken & Scoptur. We disagree. Claim preclusion may follow from a jury verdict, bench trial, or grant of summary judgment. ***DePratt v. West Bend Mut. Ins. Co.,*** 113 Wis. 2d 306, 311, 334 N.W.2d 883, 885 (1983) ("[a] judgment on the merits may be entered without a trial"). The order entered by Judge Kieffer was appealed and affirmed. This precludes Morters's claims.

B. *Frivolous Claim*

¶18 A claim is frivolous under WIS. STAT. § 814.025(3)(b) if the party or party's attorney "knew, or should have known" that the claim was "without any reasonable basis in law or equity."

> A finding of frivolousness under Wis. Stat. § 814.025(3)(b) "is based on an objective standard, requiring a determination of whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances."

Osman v. Phipps, 2002 WI App 170, ¶16, 256 Wis. 2d 589, 649 N.W.2d 701 (quoted source omitted). "The application of the frivolous claims statute to the established facts is a question of law which we decide *de novo*." *Blankenship v. Computers & Training, Inc.*, 158 Wis. 2d 702, 708, 462 N.W.2d 918, 920 (Ct. App. 1990).

¶19 Aiken & Scoptur contends that Morters and his attorney knew or should have known that there was no reasonable basis for the current claims because Judge Kieffer determined that Morters had consented to the arbitration. We agree. A reasonable litigant should have known that filing this claim against Aiken & Scoptur again was without any basis in law or fact. Accordingly, we reverse and remand for a hearing to determine Aiken & Scoptur's reasonable attorneys' fees and costs.

By the Court. – Judgment affirmed; order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX D

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

RONALD MORTERS,

Plaintiff,

v. Case No. 01-CV-004476

AIKEN & SCOPTUR, S.C.,
TIMOTHY J. AIKEN,
PAUL J. SCOPTUR,
KELLY L. CENTOFANTI,

Defendants.

JUDGMENT

(Filed Feb. 3, 2005)

The above-captioned matter having come before the court for hearing on December 13, 2004 with Nicholas C. Zales of Zales Law Office appearing on behalf of himself and Ronald W. Morters, who also appeared in person, Robert E. Sutton appearing on behalf of himself, and Paul R. Erickson of Gutglass, Erickson, Bonville, Seibel & Falkner, S.C. appearing on behalf of the defendants, and the court after having reviewed the submissions of the parties and hearing oral arguments, continued the proceedings until January 7, 2005 to render a decision.

NOW, THEREFORE, pursuant to the Order for Judgment, dated January 19, 2005;

IT IS HEREBY ADJUDGED AND DECREED that the Clerk of Court shall enter judgment:

1. In the amount of $27,943.11 against plaintiff, Ronald W. Morters, 2755 Minot Lane, Waukesha, Wisconsin 53188, and in favor of defendants, Aiken & Scoptur, S.C., Timothy J. Aiken, Paul J. Scoptur, Kelly I. Centofanti, 260 East Highland Avenue, Suite 700, Milwaukee, Wisconsin 53202;

2. In the amount of $4,927.84 against Robert E. Sutton, 2639 North Downer Avenue #3, Milwaukee, Wisconsin, 53211 and in favor of defendants, Aiken & Scoptur, S.C., Timothy J. Aiken, Paul J. Scoptur, Kelly I. Centofanti, 260 East Highland Avenue, Suite 700, Milwaukee, Wisconsin 53202; and

3. In the amount of $5,233.25 against Nicholas C. Zales, 1676 North Van Buren Street #1, Milwaukee, Wisconsin 53202 and in favor of defendants, Aiken & Scoptur, S.C., Timothy J. Aiken, Paul J. Scoptur, Kelly I. Centofanti, 260 East Highland Avenue, Suite 700, Milwaukee, Wisconsin 53202.

Dated at Milwaukee, Wisconsin this ___ day of FEB 3 2005, 2005

BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT

BY /s/ Diane Gawronski
JUDGMENT CLERK

APPENDIX E

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

RONALD MORTERS,

Plaintiff,

v. Case No. 01-CV-004476

AIKEN & SCOPTUR, S.C.,
TIMOTHY J. AIKEN,
PAUL J. SCOPTUR,
KELLY I. CENTOFANTI,

Defendants.

ORDER FOR JUDGMENT

The above-captioned matter having come before the court for hearing on December 13, 2004 with Nicholas C. Zales of Zales Law Office appearing on behalf of himself and Ronald W. Morters, who also appeared in person, Robert E. Sutton appearing on behalf of himself, and Paul R. Erickson of Gutglass, Erickson, Bonville, Seibel & Falkner, S.C. appearing on behalf of the defendants and the court after having reviewed the submissions of the parties and hearing oral arguments, continued the proceedings until January 7, 2005 to render a decision. On January 7, 2004, with the same appearances as noted above, the Court, for the reasons stated on the record, held as follows:

IT IS HEREBY ORDERED:

1. Plaintiff's motion regarding mitigation is denied; and

2. Upon instruction from the Court of Appeals attorney's fees and costs pursuant to § 814.025, Wis. Stats., shall be assessed and allocated as follows:

a. For the period of June 6, 2001 to May 7, 2002, fees and costs will be shared equally by Attorney Sutton and Mr. Morters.

b. For the period of May 8, 2002 to May 16, 2003 fees and costs will be shared equally by Attorney Zales and Mr. Morters.

c. For the period of May 17, 2003 to August 8, 2004, the costs will be assessed entirely against Mr. Morters with the fees charged between September 10 and September 25, 2003 to be reduced by twenty-five percent; and

d. For the period of August 8, 2004 to September 10, 2004, fees and costs, less $184, will be shared equally by Attorney Sutton, Attorney Zales, and Mr. Morters.

3. Ronald W. Morters shall pay to the defendants $27,943.11; and

4. Robert E. Sutton shall pay to the defendants $4,927.84; and

5. Nicholas C. Zales shall pay to the defendants $5,233.25.

The Clerk of Courts is ordered to enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 19th day of January, 2004.

BY THE COURT:

/s/ Richard J. Sankovitz
Honorable Richard J. Sankovitz
Circuit Court Judge Presiding

APPENDIX F

CIRCUIT COURT

STATE OF WISCONSIN MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

vs.

ORDER

Case No. 01-CV-004476

AIKEN & SCOPTUR, et al.,

Defendants.

At the conclusion of last Friday's hearing on reasonable costs and attorney fees, Mr. Zales, on his behalf and Mr. Morters', asked me to consider whether the recent decision in *Baumeister v. Automated Products, Inc.*, 2004 WI 148, ___ Wis. 2d ___ (December 15, 2004) precluded or limited an award to the defendants of costs and fees incurred by the defendants during the appeal stage of this case. Mr. Zales represented that the court held that unless the court of appeals makes a finding that the entire appeal is frivolous, no such award may be made. In response to my question whether the holding of *Baumeister* applied to costs and fees awarded under WIS. STAT. § 814.025 or, rather, under WIS. STAT. § 809.25, Mr. Zales represented that the case applied to WIS. STAT. § 814.025.

Mr. Zales was mistaken. *Baumeister* did not involve fees and costs awarded under WIS. STAT. § 814.025. In *Baumeister,* the court of appeals was asked to award costs and fees under WIS. STAT. § 809.25(3). The court was not presented with the question whether a circuit court in an action, like Mr. Morters', which was baseless when filed, is

justified under WIS. STAT. § 814.025 in awarding all the costs and fees of the proceedings that ensued, including the appeal, without an explicit finding by the court of appeals that the proceedings on appeal were frivolous.

Accordingly, construing Mr. Zales' request as a motion for reconsideration, IT IS HEREBY ORDERED THAT:

1. The motion for reconsideration is DENIED.

[SEAL]

/s/ Richard J. Sankovitz
Richard J. Sankovitz
Circuit Court Judge

Dated: JAN 10 2004

APPENDIX G

OFFICE OF THE CLERK

[SEAL] Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

June 14, 2006

To:

Hon. Richard J. Sankovitz
Circuit Court Judge
Safety Building
821 W. State Street
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
901 N. 9th Street, Room G-8
Milwaukee, WI 53233

Paul R. Erickson
Gutglass, Erickson, Bonville, Seibel & Falkner, S.C.
735 N. Water Street, #1400
Milwaukee, WI 53202-4106

Ronald W. Morters
2755 Minot Lane
Waukesha, WI 53188

Robert E. Sutton
Robert E. Sutton, S.C.
2639 N. Downer Ave.
Milwaukee, WI 53211

Nicholas C. Zales
Zales Law Office
1676 N. Van Buren Street, #1
Milwaukee, WI 53202

You are hereby notified that the Court has entered the following order:

Morters v. Aiken & Scoptur. S.C., et al.

No. 2005AP703 L.C. #2001CV4476

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Ronald W. Morters, and a petition for cross review having been filed by defendants-respondents-cross petitioners, Aiken & Scoptur, S.C., et al., and both considered by this court;

IT IS ORDERED that the petition for review and the petition for cross review are both denied, with $50 costs.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX H

United States Constitution

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Wisconsin

Article 1

§ 1. Equality; inherent rights

Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

§ 9. Remedy for wrongs

Section 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it,

completely and without denial, promptly and without delay, conformably to the laws.

Wisconsin Statutes

802.05. Signing of pleadings, motions, and other papers; Representations to court; Sanctions.

(1) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and state bar number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by of affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(2) Representations to Court. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

(a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension,

modification, or reversal of existing law or the establishment of new law.

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(3) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation in accordance with the following:

* * *

(Note: Statute effective July 1, 2005)

814.025 Costs upon frivolous claims and counterclaims.

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action,

special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

(4) To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

(Note: Statute repealed effective July 1, 2005)

APPENDIX I

SUPREME COURT OF WISCONSIN
Appeal No. 2005AP000703

RONALD W. MORTERS,

Plaintiff-Appellant-Petitioner,

v.

AIKEN & SCOPTUR, S.C.,
TIMOTHY J. AIKEN,
PAUL J. SCOPTUR AND
KELLY L. CENTOFANTI,

Defendants-Respondents-Respondents.

PETITION FOR REVIEW

Court appealed from: Wisconsin Court of Appeals, District I, Hon. Ted. E. Wedemeyer, Jr., Ralph Adam Fine & Patricia S. Curley, Appellate Judges

Ronald W. Morters
Petitioner, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

Finally, in his citation of supplemental authorities, Ronald pointed out that paragraph 9 of the *Howell* decision reaffirmed that an appellate court decides whether an appeal is frivolous as a matter of law. (R. NN; P. App. 181 & 182)

In light of the overwhelming authority which showed their appellate frivolity request to be baseless, Aiken & Scoptur should never have made the request or should have conceded the issue. Fairness and compliance with Mr. Morters' right to due process of law under the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1 of the Wisconsin Constitution require that this matter be remanded to the trial court for a determination as to whether the appellate frivolity request violated Sec. 814.025. By granting review, the Supreme Court can establish a remand policy to cover unusual situations like this one.

CONCLUSION

The mitigation and allocation aspects of this petition present important issues which satisfy the law development criteria for Supreme Court review listed under

* * *

APPENDIX J

COURT OF APPEALS OF WISCONSIN
DISTRICT I
Appeal No. 2005AP000703

RONALD W. MORTERS,

Plaintiff-Appellant,

v.

AIKEN & SCOPTUR, S.C.,
TIMOTHY J. AIKEN, PAUL
J. SCOPTUR AND KELLY
L. CENTOFANTI,

Defendants-Respondents.

APPELLANT'S BRIEF

Court appealed from: Circuit Court for Milwaukee County

Presiding Judge: Hon. Richard J. Sankovitz, Circuit Judge

Ronald W. Morters
Appellant, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

reflected the final calculations of the amounts assessed. (R. 82-1 & 2; A. App. 136 & 137) Morters objected to the term "instruction" in paragraph 2 of the order because there was no instruction implicit or explicit from the Court of Appeals to award appellate attorney's fees. (R. 81-1; A.

App. 152) Additional relevant facts will be discussed in the Argument.

ARGUMENT

I. A CIRCUIT COURT MAY NOT ASSESS APPELLATE FRIVOLITY COSTS AND FEES WHEN THE PARTY REQUESTING SUCH ASSESSMENT FAILED TO BRING A SEC. 809.25(3) MOTION IN THE COURT OF APPEALS AND THE COURT OF APPEALS DID NOT FIND THE APPEAL TO BE FRIVOLOUS PURSUANT TO SEC. 809.25(3).

A. Introduction and Applicable Standards of Review

This issue involves the application and construction of Secs. 814.025 and 809.25(3) and their interaction with each other. The construction of a statute or application of a statute to a particular fact situation is a question of law which the appellate courts may review without deference to the trial court's reasoning. *Bucyrus-Erie Co. v. State Indus. Labor & Human Relations Dept.*, 90 Wis. 2d 408, 417, 280 N.W. 2d 142 (1979) and *Minuteman v. Alexander*, 147 Wis. 2d 842, 853, 434 N.W. 2d 773 (1989). Legal questions are the province of the appellate courts and are reviewable ab initio. *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 551, 309 N.W. 2d 366 (Ct. App. 1981) This issue also involves constitutional considerations. The application of constitutional principles to the facts of a case presents a question of law. *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 62, 443 N.W. 2d 50 (Ct. App. 1989)

In the following discussion, Mr. Morters will show that there are numerous reasons as to why the trial court

was wrong in awarding appellate costs and fees. After conducting a de novo review, the Court of Appeals will see that such decision was erroneous.

B. No Statutory Authority for an Appellate Award by the Trial Court.

The most basic reason why the trial court was wrong in awarding those fees is that it did not have the statutory authority to award such fees. The authority for an appellate frivolity award is derived from Sec. 809.25(3)(a) which provides, in relevant part, as follows:

> "If an appeal or cross-appeal is found to be frivolous by the court; the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief."

Sec. 809.25(3)(a)'s statutory mandate clearly requires a timely frivolity motion in the Court of Appeals and a finding by the Court of Appeals before a frivolity award can be made. A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or the Supreme Court if the case has reached that level. The plain language of Sec. 809.25(3)(a) does not permit a trial court to award appellate frivolity fees. Such authority is vested in the Court of Appeals.

Sec. 809.25(3)(c) sets forth the following prerequisite for finding an appeal to be frivolous:

> "In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

Once again, the clear language of the statute requires the Court of Appeals to make the necessary determination. After finding an appeal to be frivolous, the Court of Appeals then remands the case to the trial court with directions to determine the amount of the appellate assessment. See *Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W. 2d 1 (Ct. App. 1998). Also see Heffernan, Michael G., *Appellate Practice and Procedure in Wisconsin* (3rd Ed. 2002), Chapter 16, pages 4-6, for a general discussion of appellate frivolity.

In this case, Aiken & Scoptur failed to file a timely frivolity motion with the Court of Appeals in accordance with Sec. 809.25(3)(a). (R. 74-2; A. App. NR) The Court of Appeals did not discuss appellate frivolity and certainly made no such finding. (R. 62-1 through 9; A. App. 143-151) On page 9 of its decision, the Court addressed trial court frivolity under Sec. 814.025(3)(b) and reversed Judge White's determination on such issue. (R. 62-9; A. App. 151) The remand was for the purpose of determining the amount of trial court costs and fees. (R. 62-9; A. App. 151)

An examination of case law confirms that the authority to determine appellate frivolity and order such award has been vested in the Court of Appeals. Citing *J. J. Andrews, Inc. v. Midland*, 164 Wis. 2d 215, 225, 474 N.W. 2d 756 (Ct. App. 1991), the Court in *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 841, 520 N.W. 2d 93 (Ct. App. 1994) noted that "[w]e decided as a matter of law whether an appeal is frivolous." The Court referred to Sec. 809.25(3)(c)'s requirement that it must find that the appeal was filed in bad faith or was without a reasonable basis. *NBZ*, 185 Wis. 2d at 841.

In *Lucareli v. Vilas County*, 2000 WI App. 157, par 9, 238 Wis. 2d 84, 89, 616 N.W. 2d 153 (Ct. App. 2000), the Court noted that only an appellate court can find an appeal frivolous under Sec. 809.25(3). The Court in *Lucareli* had made the appellate frivolity determination and remanded the case to the trial court for a determination of the amount of reasonable attorney fees. *Lucareli*, 2000 WI App. at par. 8. Further recognition of the appellate courts authority over appellate frivolity is furnished by the Supreme Court's consideration in the pending appeal of *Howell v. Denomie*, No. 2003AP979-FT, of the issue as to what procedures the *Court of Appeals* must employ before finding an appeal frivolous under Sec. 809.25(3). See Table of Pending Supreme Court Cases in the Court's Website at www.wicourts.gov. The Supreme Court's order granting review specifically defined this issue. (R. 79-4; A. App. NR)

The Court of Appeals has also insisted that the appellate frivolity movant make a timely motion pursuant to Sec. 809.25(3)(a). In *Sheard v. Sheard*, 129 Wis. 2d 308, 309, 384 N.W. 2d 712 (Ct. App. 1986), the successful respondents filed an appellate frivolity motion after the Court's decision. The Court denied this motion and held

that a claim under Sec. 809.25(3) must be submitted no later than the filing of the respondent's brief. *Sheard*, 129 Wis. 2d at 309. By virtue of the language of Sec. 809.25(3) and the case law interpreting it, *Judge Sankovitz did not have the authority to make an assessment of appellate costs and fees.*

Despite Ronald's presentation of ample authority demonstrating that the trial court does not have the authority to make an appellate frivolity award,[5] *Judge Sankovitz ignored the same.* (R. 89-23; A. App. 123) Instead, the requirements of a Sec. 809.25(3) motion and an appellate frivolity finding by the Court of Appeals were considered a "formality". (R. 89-23; A. App. 123) Our legal system will be in sad shape if the trial courts are allowed to treat the statutes and compliance therewith as formalities.

In a final attempt to show the trial court that it did not have the authority to make an appellate assessment, Morters cited the recent *Baumeister* decision. (R. 89-29 & 30; A. App. 129 & 130) Because it involved Sec. 809.25(3) and not 814.025, the Court was unpersuaded. (R. 80-1 & 2; A. App. 138 & 139) Although *Baumeister* dealt with Sec. 809.25(3), *Judge Sankovitz did not recognize the ultimate message which is that the Court of Appeals must find the appeal to be frivolous in order to impose sanctions. Baumeister*, 2004 WI at par. 25 & 26.

Sec. 809.25(3)'s language is clear, unambiguous, and mandatory. The statute requires a timely motion and an appellate frivolity finding by the Court of Appeals in order

---

[5] (R. 74-2 through 4; A. App. NR)

to have an appellate frivolity award. By failing to file a timely frivolity motion, Aiken & Scoptur forfeited their right to any appellate assessment and could not raise the issue in subsequent proceedings. Although Judge Sankovitz admitted he did not have the authority to make an appellate frivolity finding[6], he nevertheless proceeded to act in a manner contrary to the statute. Sec. 809.25(3) and the aforementioned case law demonstrate that appellate frivolity determinations and assessments are the province of the appellate courts.

C. Stringent Standards for Appellate Frivolity

The trial court's comment[7] to the effect that it believed nothing substantive would be accomplished by requiring an appellate frivolity finding by the Court of Appeals ignores the stringent standards which have arisen governing appellate frivolity. In *Sheard*, the Court of Appeals explained that the reason for requiring an appellate frivolity motion before the completion of the briefing process is that it allows the Court to consider the merits of the appeal and the frivolity claim at the same time. *Sheard*, 129 Wis. 2d at 309. The frivolity issue requires an evaluation of the issues raised on appeal. *Sheard*, 129 Wis. 2d at 309.

In order to find an appeal frivolous and award appellate fees, *the entire appeal* must be determined to be frivolous. See *Tennyson v. School Dist.*, 2000 WI App. 21, par. 35, 232 Wis. 2d 267, 290, 606 N.W. 2d 594 (Ct. App. 1999) and *Manor Enterprises v. Vivid, Inc.*, 228 Wis. 2d

[6] (R. 89-28; A. App. 128)

[7] (R. 89-23; A. App. 123)

382, 403, 596 N.W. 2d 828 (Ct. App. 1999). A frivolous argument in a brief is not enough to find the appeal frivolous. *In re Carpenter v. Mumaw*, 230 Wis. 2d 384, 398, 602 N.W. 2d 536 (Ct. App. 1999) Rule 809.25(3) does not allow the Court to find that individual arguments in a brief are frivolous. *Chase Lumber & Fuel Co. v. Chase*, 228 Wis. 2d 179, 210 n. 12, 596 N.W. 2d 840 (Ct. App. 1999) and *Nichols v. Bennett*, 190 Wis. 2d 360, 365 n. 2, 526 N.W. 2d 831 (Ct. App. 1994) These principles were recently reiterated by the Supreme Court in the *Baumeister* case. *Baumeister*, 2004 WI at par. 26. Furthermore, when a motion is made to declare an appeal nonfrivolous, *the Court will resolve all doubt in favor of finding the claim nonfrivolous. Baumeister*, 2004 WI at par. 25 citing *In Matter of Estate of Bilsie*, 100 Wis. 2d 342, 350, 302 N.W. 2d 508 (Ct. App. 1981)

In affirming the grant of summary judgment, the Court of Appeals based its decision *on claims preclusion alone* and did not address Ronald's remaining issues. (R. 62-2; A. App. 144) Had a timely frivolity motion been made, the Court of Appeals would have been required to find all appellate issues frivolous in order to make an assessment. Even if it possessed the authority to determine appellate frivolity, the trial court would need to make a similar finding. Judge Sankovitz made no such determination and did not have the appellate briefs before him. (R. 89-12; A. App. 112)

As discussed in Part J, all of Ronald's issues and arguments had a reasonable basis. Judge Sankovitz' comment about nothing substantive being accomplished by requiring an appellate frivolity finding by the Court of Appeals is indicative of a lack of understanding for the

stringent standards governing frivolity and the Court of Appeals' role in their application.

D. No Authority for a Frivolity Award against a Cross-Respondent

Besides a general lack of authority by the trial court to make any appellate frivolity award, the trial court's award of appellate costs and fees related to Ronald's cross-response runs contrary to another aspect of Sec. 809.25(3). The statute permits an award of appellate costs and fees "if an appeal or cross-appeal is found to be frivolous." Mr. Morters, however, received a favorable determination from Judge White on the trial court frivolity issue and was therefore the cross-respondent on Aiken & Scoptur's appeal from that determination. The plain language of Sec. 809.25(3) does not permit an appellate award if a response or cross-response is found to be frivolous.

In *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 664-665, 457 N.W. 2d 538 (Ct. App. 1990), an appellant contended that the respondent's position was frivolous and requested an appellate assessment. The Court interpreted Sec. 809.25(3) and denied such request in the following passage:

> "Rule 809.25(3), Stats., which covers frivolous appeals, permits the award of 'costs and fees' if the court finds *'an appeal or cross-appeal' to be frivolous*. Rule 809.25(3)(a). [fn10] Its language does not permit the award of frivolous appeal costs and fees to an appellant, nor has Peck directed us to, any authority to the contrary. Indeed, as a recent and highly-regarding treatise notes in connection with similar federal counterparts to Rule 809.25(3)(a), "[n]o appellant may

> receive an award under Appellate Rule 38 or [28 U.S.C.] Section 1912 no matter how outrageous the appellee's position." *See G. Joseph, Sanctions: The Federal Law of Litigation Abuse* sec. 30(c)(2), at 413 (1989). [fn11]" *Peck*, 156 Wis. 2d at 676-677. [Emphasis added]

The Court in *Wisconsin Chiropractic* reached a similar conclusion where a successful appellant requested an appellate assessment against the respondent. *Wisconsin Chiropractic*, 2004 WI App. at footnote 15. According to the Court, Sec. 809.25(3) has no application when the party requesting the fees is the appellant. *Wisconsin Chiropractic*, 2004 WI App. at footnote 15. Clearly, no court has the authority to assess appellate frivolity costs and fees against a respondent or cross-respondent.

E. Misplaced Reliance on *Richland County*

Judge Sankovitz' appellate award was made under the guise of the trial court frivolity statute, i.e. Sec. 814.025, and he attempted to support the award by reliance on the *Richland County* case. (R. 89-20 through 23; A. App. 120-123) The situation in *Richland County*, was clearly distinguishable from this case, and the trial court failed to recognize this important distinction. In *Richland County*, the Court agreed with the litigant's claim that she was entitled to costs and attorney fees on the appeal. *Richland County*, 146 Wis. 2d at 278. On its remand to the trial court, the Court specifically instructed that "[t]he award shall include costs and fees on this appeal." *Richland County*, 146 Wis. 2d at 273.

Even though Sec. 809.25(3) was not specifically mentioned, the Court of Appeals made what is essentially

a de facto appellate frivolity determination. There is a clear direction by the Court of Appeals to the trial court to include such fees in its assessment. The Court then proceeded to discuss why an appellate assessment was necessary.

In the case at hand, there is no language in the Court's opinion which could be construed as a de facto appellate frivolity finding and instruction to the trial court to assess appellate costs and fees. (R. 62-1 through 9; A. App. 143-151) Judge Sankovitz admitted that the Court of Appeals did not direct him to assess any appellate costs and fees. (R. 89-18; A. App. 118) In light of this critical distinction between the two cases, *Richland County* cannot support an appellate frivolity determination against Mr. Morters.

F. Inapplicability of Sec. 814.025 to Appeals

The trial court believed that Sec. 814.025 gave it the authority to award appellate costs and fees. (R. 89-22 through 25; A. App. 122-125) In the Court's opinion, everything that follows from the moment a frivolous action is filed should be included in an award. (R. 89-25; A. App. 125) The language of Sec. 814.025 itself and the case law interpreting the statute proves the Court wrong. Sec. 814.025(1) provides as follows:

> "If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, *at any time during the proceedings or upon judgment*, to be frivolous by the court, the court shall award to the successful party costs determined under

> s. 814.04 and reasonable attorney fees." [Emphasis added]

By its very terms, the statute only covers frivolity during the trial court proceedings and upon judgment. It does not cover post judgment frivolity matters.

Case law supports this interpretation. In *Estate of Bilsie*, the Court of Appeals reached the following conclusions as to the limits of Sec. 814.025:

> "Respondents ask that we apply sec. 814.025, Stats., to assess attorney's fees for a frivolous appeal. Section 814.025 does not permit us to do so.
>
> Section 814.025(1), Stats., requires a finding of frivolousness "at any time during the proceedings or upon judgment." Section 814.025(3) requires a finding that the "action, special proceeding, counterclaim, defense or cross complaint was commenced, used, or continued in bad faith." Appeals are not referred to, or within the time periods covered by, either subsection." *Estate of Bilsie*, 100 Wis. 2d at 357.

The Court in *Peck* noted that Sec. 814.025 does not apply to appeals. *Peck*, 156 Wis. 2d at 675. Sec. 814.025 does not give the trial court the authority to make an appellate frivolity award.

G. Separate and Distinct Areas Covered by Sec. 814.025 and Sec. 809.25(3).

A reasonable construction of the interaction of Secs. 814.025 and Sec. 809.25(3) shows that they were designed to cover separate areas of frivolity. Sec. 814.025 was

intended to cover trial court frivolity, while Sec. 809.25(3) governs appellate frivolity. These two sections were not meant to overlap. In order to eliminate any potential problem with overlapping, Sec. 809.84 provides that appeals are governed by the rules of civil procedure as to all matters not covered by the appellate rules unless the circumstances of the appeal or the context of the civil procedure rule dictates a contrary result.

Since 809.25(3) covers frivolity at the appellate level, Sec. 814.025 is not applicable as held in the *Peck* and *Estate of Bilsie* cases. Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be resolved if possible. *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis. 2d 540, 556, 151 N.W. 2d 617 (1967) Allowing a trial court to make an appellate frivolity assessment would create statutory conflict.

In *Lindevig v. Dairy Equipment Co.*, 150 Wis. 2d 731, 743, 442 N.W. 2d 504 (Ct. App. 1989), the Court of Appeals essentially recognized the separation between trial court and appellate frivolity. On appeal, the Court of Appeals was asked to grant trial court fees under Sec. 814.025, but it declined such request. *Lindevig*, 150 Wis. 2d at 743. The Court indicated that it may not do so and remanded the issue to the trial court. *Lindevig*, 150 Wis. 2d at 743. The *Lindevig* Court respected the fact that it could not make a determination on a matter within the province of the trial court. *Judge Sankovitz should have shown similar regard for a matter within the realm of the Court of Appeals.*

The plain language of Sec. 814.025 establishes that it was intended to cover trial court frivolity, while Sec. 809.25(3) deals with appellate frivolity. The primary

source in construing a statute is the language of the statute, and absent ambiguity, the Court's duty is to give that language its ordinary meaning. *State v. McKenzie*, 139 Wis. 2d 171, 176, 407 N.W. 2d 274 (Ct. App. 1987) The trial court's attempted use of Sec. 814.025 to impose appellate frivolity shows contempt for these statutes.

H. Constitutional Problems

The attempt by a court to decide a matter over which it has no authority presents a serious constitutional problem as well. Article VII, Sec. 5(3) of the Wisconsin Constitution gives the Court of Appeals appellate jurisdiction in the district as the legislature may provide by law. Sec. 808.03 provides for both appeals as of right and appeals by permission. Article VII, Sec. 8, gives the Circuit Courts original jurisdiction in all matters civil and criminal except as otherwise provided by law. The Circuit Court's jurisdiction is subject to the appellate and supervisory powers reserved by the Constitution to the Court of Appeals and the Supreme Court. See *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 550, 307 N.W. 2d 881 (1981) and *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 531 N.W. 2d 606 (Ct. App. 1995). By statute, appellate frivolity was placed within the appellate jurisdiction of the Court ~~of Appeals,~~ while the Circuit Courts were assigned the adjudication of trial court frivolity matters.

If Judge Sankovitz' appellate frivolity award is allowed to stand, the Court of Appeals will be approving an unconstitutional usurpation of the authority of the Court of Appeals ~~by the trial court~~. In *Jankowski v. Milwaukee County*, 104 Wis. 2d 431, 439, 312 N.W. 2d 45 (1981), the

Supreme Court warned that a statute should be construed so as to avoid constitutional objections.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the deprivation of life, liberty, or property without due process of law. Article I, Sec. 1, of the Wisconsin Constitution has been interpreted as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth Amendment. See *Chicago & N.W. Ry. v. LaFollette*, 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969). By ignoring the process established by statutory and case law for the adjudication of appellate frivolity, the trial court has also violated Ronald's due process right.

I. Inapplicability of Per Se Presumption

Aiken & Scoptur contended that no appellate frivolity finding was needed by the Court of Appeals because an unsuccessful appeal based on a frivolous claim is per se frivolous according to *Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W. 2d 619 (Ct. App. 1990). (R. 72-2; A. App. NR) A review of *Riley* and *Belich v. Szymaszek*, 224 Wis. 2d 419, 435, 592 N.W. 2d 254 (Ct. App. 1999) clearly shows that Aiken & Scoptur misconstrued the per se presumption.

In *Riley*, there was a frivolity finding at the trial court level which was appealed and affirmed. *Riley*, 156 Wis. 2d at 252. When addressing appellate frivolity, the court held as follows:

> " . . . we hold that upon an appeal from a ruling of frivolousness, the reviewing court need not determine whether the appeal itself is frivolous before it can award appellate costs and reasonable

> attorney's fees. Rather, if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal. *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 438 (7th Cir. 1989)."

In order for the presumption to be operative, the appeal has to be from an underlying trial court ruling of frivolity. Relying on *Riley*, the Court in *Belich* determined that its affirmance of a trial court frivolity ruling renders the appeal frivolous per se. *Belich*, 224 Wis. 2d at 435. In *Wisconsin Chiropractic*, the Court determined that the per se presumption was not applicable since there was no underlying trial court frivolity determination which had been affirmed. *Wisconsin Chiropractic*, 2004 WI App. at par. 1 and footnote 15. Since Judge White did not find the action to be frivolous, the per se presumption is inapplicable in this case.

J. No Frivolous Issues on Appeal

1. Introduction

As discussed previously, case law dictates that all appellate issues must be found to be frivolous in order to impose an appellate frivolity award. Even if the Court finds the trial court had authority to make an appellate assessment, Ronald would alternatively argue that the entirety of his appeal could not have been found frivolous by any court. A reference to Ronald's appellate arguments reveals that none of his appellate issues was frivolous. A claim is not frivolous merely because it was later shown to be incorrect or because it lost on the merits. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 243-244, 517 N.W. 2d 658 (1994).

2. The Dispositive Issue

Ronald will first address the claims preclusion issue which disposed of his appeal. Mr. Morters contended in

* * *

The Court has repealed Secs. 802.05 and 814.025 and adopted as a recreated Sec. 802.05 the provisions of Rule 11, with certain modifications.[14] Effective July 1, 2005, such injustice will cease in future cases.

For the reasons discussed herein, the trial court erred in its assessment of trial court fees. No fees should have been allowed subsequent to May 7, 2002. As to the $9,779.68 assessment covering the time period prior to May 7, 2002, Ronald believes that Aiken & Scoptur should have acted earlier thereby lessening this assessment. Whatever the assessment amount for such period, responsibility for the same should have been imposed solely on Attorney Sutton.

CONCLUSION

In Section I of this Brief, Mr. Morters has shown that the trial court did not have the authority to make an appellate frivolity assessment against him. When Aiken & Scoptur failed to make a Sec. 809.25(3) motion, appellate frivolity sanctions became a dead issue. Alternatively, he has demonstrated that his appellate issues were not frivolous. Ronald W. Morters respectfully requests that the Court of Appeals reverse and eliminate the $17,820.02 assessment for appellate costs and fees made against him.

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[14] See Order 03-06 in *Wisconsin Lawyer*, May 2005 Edition, on pages 44-51.

Since the statutes and case law clearly indicated that a trial court does not have the authority to make an appellate frivolity assessment unless specifically directed to do so by the Court of Appeals after the Court has found the appeal to be frivolous, Mr. Morters also believes it is appropriate for the Court to remand the case to the trial court with instructions for the lower court to consider whether Aiken & Scoptur's appellate fee request was violative of Sec. 814.025.

Ronald's discussion in Section II has shown that the trial court's assessment of trial court costs and fees was erroneous because Aiken & Scoptur failed to mitigate in accordance with *Jandrt.* As to the portion of the assessment covering the period subsequent to May 7, 2002, Mr. Morters respectfully requests that the Court reverse and eliminate such

* * *

APPENDIX K

Ronald W. Morters
2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355
July 1, 2005

Clerk of Court of Appeals
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: Morters -vs- Aiken & Scoptur, et al
Appeal No. 2005AP000703
Citation of Supplemental Authority

Dear Madam:

Pursuant to Wisconsin Statutes, Sec. 809.19(10), I am submitting this letter as a citation of supplemental authorities for the Court to consider in this Appeal. In accordance with the applicable rules, an original and four copies of this letter are being submitted to your office and one copy of said letter is being served by mail on the other parties involved in this appeal. Please file same and submit this letter for the Court's consideration. I have also enclosed an extra copy of this letter which I would ask you to file stamp and return to me in the self-addressed stamped envelope included herein.

In Argument, Part I, of my Appellant's Brief, I presented numerous arguments showing that a Circuit Court may not assess appellate frivolity costs and fees when the party requesting such assessment failed to bring a Sec. 809.25(3) motion in the Court of Appeals and the Court of Appeals did not find the appeal to be frivolous pursuant to Sec. 809.25(3). See Appellant's Brief, pages 21-43. Among other things, I argued that Sec.

809.25(3) and the applicable case law demonstrate that only an appellate court can find an appeal frivolous and order the imposition of appellate frivolity costs. A trial court has no authority to make an appellate frivolity award. See Appellant's Brief, pages 22-29.

As one of the points of support for my argument, I cited on page 26 of my Brief the then pending appeal[1] of *Howell v. Denomie*, No.2003AP979-FT wherein the Supreme Court was considering the issue with regard to what procedures the *Court of Appeals* must employ before finding an appeal frivolous. On June 22, 2005, the Supreme Court issued its decision in *Howell v. Denomie*, 2005 WI 81, ___ Wis. 2d ___, ___ N.W.2d ___ (2005).

In discussing the standard of review for appellate frivolity in paragraph 9 of its decision, the Supreme Court reaffirmed that *an appellate court* decides whether an appeal is frivolous solely as a question of law. Referring to Sec. 809.25(3) the Supreme Court noted that sanctions for a frivolous appeal will be imposed if the Court concludes that a party or its attorney knew or should have known the appeal had no reasonable basis in law or equity and could not be supported by a good faith argument for extension, modification, or reversal of existing law. *Howell*, 2005 WI 81 at par. 9. Based upon the authority cited in my Appellant's Brief and the language of *Howell*, it is the Court of Appeals, and not a trial court, that must determine whether an appeal is frivolous and order the imposition of appellate frivolity sanctions.

On page 30 of my Brief, I further noted that in order to find an appeal frivolous, the entire appeal must be determined to be frivolous. I then alternatively argued in

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[1] My Brief was filed on June 15, 2005.

Part I, Section J, that no court could have found the entirety of my appeal to be frivolous. In paragraph 9 of the *Howell* decision, the Supreme Court reaffirmed that an appellate court must conclude that the entire appeal is frivolous in order to award costs and attorney fees.

In paragraphs 16 through 21 of its decision, the Supreme Court addressed the procedure by which the Court of Appeals may determine an appeal is frivolous pursuant to Sec. 809.25(3)(c). Throughout its analysis, the Supreme Court consistently referred to the Court of Appeals and made no reference to any appellate frivolity award by a Circuit Court. In view of the authorities presented in my Brief and the *Howell* decision, it is clear that appellate frivolity is solely within the province of the appellate courts. Only an appellate court can determine appellate frivolity and order the imposition of appellate frivolity costs. A trial court simply does not have the authority to make an appellate assessment. The authority in this area is, in fact, so definitive that the respondents should now concede this issue and be prepared to pay the full costs of pursuing their frivolous request for appellate fees. Thank you for your attention and courtesy.

Respectfully submitted,

/s/ Ronald W. Morters
Ronald W. Morters
Appellant, Pro Se

Enclosures

Copy to:

Attorney Paul R. Erickson
Attorney Robert E. Sutton
Attorney Nicholas C. Zales

APPENDIX L

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY
BRANCH 01

RONALD W. MORTERS,

PLAINTIFF,

-VS-

AIKEN & SCOPTUR, S.C.,
TIMOTHY J. AIKEN,
PAUL J. SCOPTUR,
KELLY I. CENTOFANTI,

CASE NO.
01-CV-004476

DEFENDANTS.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 26, 2002)

Background

For his recitation of the facts in the case before this Court, the Plaintiff set forth the background and facts of the case quoting from a related but unpublished decision.[1] Those facts substantially agree with the facts set forth in the Defendants' moving papers and are substantially recited herein.[2]

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[1] Plaintiff's Brief at page 2, citing to the unpublished decision of *Morters v. Kuenzli*, 228 Wis.2d 173, 602 N. W.2d 759 (Ct. App. 1999), review denied, 228 wis.2d 508 (1999); Slip Op. At 3-4, Ex. "C" to the Aff Of Atty. Faught in support of Defendants' Motion.

[2] The court recognizes that reference to unpublished decisions is limited to "support a claim of res judicata, collateral estoppel, or law of the case." Wis. Stat. § 809.23 (3) (2001). Reference to the unpublished opinion in this case is appropriate for several reasons including: (1) in response to the estoppel and claim preclusion issues; (2) to respond to

(Continued on following page)

This action arose from a motor vehicle accident in which the Plaintiff Ronald Morters, his wife, Ann, and his granddaughter, Shannon, were injured.[3] When the case was initially brought in 1994, Plaintiff hired Attorney Barr to represent his family in a

* * *

> The Plaintiff absolutely denies he ever was notified of, or agreed to have his Waukesha County Circuit Court jury trial dismissed and his personal injury claims resolved by binding arbitration.[60]

The Defendants disagree with the Plaintiff's position indicating that Plaintiff ultimately agreed to binding arbitration. Defendants also point out that the Plaintiff continued with arbitration, even after Defendants were discharged as his counsel and Plaintiff was represented by Attorney Zick. And finally, Defendants point out that Plaintiff accepted the arbitrator's award without an appeal and without any motion to vacate it.

Regardless, it is clear that the issue of whether Plaintiff agreed to binding arbitration is an issue in dispute. It is clear from this record that the Plaintiff's position is: (1) That he would have realized a greater award if he had not been "forced" into binding arbitration; (2) That the Defendants Aiken & Scoptur are negligent in tort and contract and should be responsible for damages

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the arguments and positions of both parties in the case before this court who rely heavily on these prior unpublished cases and proceeding in their arguments before this court and (3) because the prior proceedings as reflected in the briefs of the parties before this court are so intricately woven and form a significant part of the history of this case.

[60] Plaintiff's Brief, at 3; *see also generally*, Morters Aff. at 1-3.

and; (3) That the prior arbitrators' award is not dispositive of the case before this court.

The Court, however, concludes that the disputed issue of whether or not the Plaintiff agreed to binding arbitration or whether or not the defendants engaged in binding arbitration without the Plaintiffs consent **is not** a **"material"** issue of fact which precludes summary judgment in this case.

Negligence

As stated *in Lewandowski v. Continental Casualty Co.*,[61] and *Helmbrecht v. St. Paul Insurance Company*,[62] a plaintiff has the burden of proving four elements to sustain

* * *

Based on the insufficiency of the evidence this court cannot conclude that Morters has satisfied the third and fourth elements necessary to sustain his claim. Even if Aiken & Scoptur were negligent, Morters still cannot satisfy the fourth element; specifically, that he would have prevailed in his suit but for the negligence of Aiken & Scoptur. The evidence is simply insufficient to make this showing; furthermore, it is evident from the [sic] both prior decisions of the other courts related to this action that in neither has Morters been able to show that any previous attorney – negligent or not – compromised his

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[61] *Lewandowski v. Continental Casually Co.*, 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979).

[62] *Helmbrecht v. St. Paul Insurance Company*, 122 Wis.2d 94, 103, 362 N.W.2d 118 (1985).

award such Damages cannot lie without negligence, and Morters is unable to meet the four elements necessary to sustain a legal malpractice claim.

Public Policy Precludes Plaintiff's Claims

Public policy strongly favors preclusion of Ronald Morters' claims. Such methodology is not often used; however, there is a history of case law – all factually and procedurally different – supporting such policy decision even where an attorney is found to be negligent. Here, there is a plaintiff with a history of suing his attorneys, who has already received a substantial award, and who cannot prove that he would have been successful in securing a larger award at trial. Allowing this action to proceed potentially opens the door to future actions by arbitration claimants dissatisfied with their arbitration awards, and could effectively chill a lawyer's representation of the client.

In *Bolte v. Joy*, plaintiff Bolte sued is former attorney Kelly, for injury to Bolte's reputation resulting from "public dissemination of a jury verdict in an action in which Kelly represented [Bolte]."[112] Bolte's insurer refused insurance payments stemming from a fire that occurred in a building owned by Bolte.[113] The insurer was of the opinion that

* * *

[112] *Bolte v. Joy, et al*, 150 Wis.2d 744, 746, 443 N.W.2d 23 (Ct. App. 1989).

[113] *Id.* at 746.

> is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.[122]

The *Bolte* trial court found factor six persuasive, reasoning that allowing a party "to sue his trial attorney for consequential damages even though he has received the remedy originally sought in the action, no legal check would remain against trial lawyers by their clients."[123] Noting, specific to that case, the public nature of jury trials, the court stated that allowing the Plaintiff to proceed would "open the door to litigious flyspecking which can only have a chilling effect upon the lawyer's duty to zealously represent the interests of his or her client."[124] Significantly, "liability for damages, caused by a wrong, ceases at a point dictated by public policy or common sense."[125]

From a policy standpoint, this court finds factors five and six, *supra*, especially persuasive. Morters has been unable to show that he has been damaged *and* he has accepted the five hundred thousand dollar arbitration

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[122] *Bolte*, 150 Wis.2d at 750 (quoting *Coffey*, 74 Wis.2d at 541 (citations omitted)).

[123] *Bolte*, 150 Wis.2d at 750-751.

[124] *Id.* at 751.

[125] *Id.* (quoting *Wilson v. Continental Insurance Cos.*, 87 Wis.2d 310, 325, 274 N.W.2d 679 686 (1979)).

award. Allowing this case to proceed might open the door to fraudulent claims against attorneys by litigants unsatisfied with a substantial award.

In *Bolte*, the complaint against attorney Kelly was dismissed in the interest of preserving "the litigants and the court's resources."[126] This is the fourth court before which Morters brings claims stemming from one award. Policy interests, as enunciated in

* * *

Finally, the court examines whether "matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action."[156] In the present case, this court finds that application of collateral estoppel would not be fundamentally unfair; rather, as discussed previously, public policy favors the application of collateral estoppel.[157]

Plaintiff's actions of legal malpractice against his counsel prior to Aiken & Scoptur, Attorney Barr, were adjudged frivolous. Further appellate courts have refused to review that decision. Plaintiff accepted the arbitration award and the record indicates that Plaintiff has not disputed the arbitration award.

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[126] *Bolte*, 150 Wis.2d at 749.

[156] *Michelle. T*, 173 Wis.2d at 689.

[157] *Id.*

[156] *Id.*

[157] *See supra*, pp. 17-20.

The claims and issues are the same. In prior actions, the claims and issues revolved around negligent representation, just cause for discharging counsel and entitlement to attorneys' fees, speculation regarding damages in regards to the insurance company, and the effect of the arbitration proceeding and award on the outcome of Plaintiff's case. The present claims of the Plaintiff are grounded in the same theory of legal malpractice, and seek the same result: damages beyond the arbitrators' award based on a 'presumption' or possibility that a jury might have rendered a different result. The prior proceedings are not significantly different as to warrant relitigation here.

Order

Based on the entire record and proceedings related to and in this case, the Court hereby enters an order granting the Defendants' motion for a summary judgment.

Dated at Milwaukee, Wisconsin, this 26th day of August 2002.

BY THE COURT:

/s/ Maxine A. White
JUDGE MAXINE ALDRIDGE WHITE
CIRCUIT COURT JUDGE
BRANCH 01

APPENDIX M

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY
BRANCH 01

RONALD W. MORTERS,

Plaintiff,

-vs-

AIKEN & SCOPTUR, S.C.,
TIMOTHY J. AIKEN,
PAUL J. SCOPTUR,
KELLY L. CENTOFANTI,

Case No.
01-CV-004476

Defendants.

MOTION FOR RECONSIDERATION

April 29, 2003. HONORABLE MAXINE A. WHITE,

presiding, Circuit Court Judge.

APPEARANCES:

ZALES LAW OFFICE, appearing by NICHOLAS C. ZALES, Attorney at Law, 1676 North Van Buren Street, No. 1, Milwaukee, Wisconsin, 53202-8411, appeared on behalf of the Plaintiff.

GUTGLASS, ERICKSON, BONVILLE, SEIBEL, & FALKNER, S.C., appearing by CATHERINE A. FAUGHT, Attorney at Law, 735 North Water Street, Suite 1400, Milwaukee, Wisconsin, 53202, appeared on behalf of the Defendants.

* * *

[14] goes further than that. The appellate courts of this state know that – we all know that this is a case that is

not for publication, but that I am looking at it under the standard that is allowed for limited use to see whether or not this represents the law of the case before this court essentially. I'm not going to read Footnote 41, but that is why I didn't cut off the defendants' motion saying you are asking me to look at unpublished law, because I looked at it and explained the reasons for it in Footnote 41. Moving beyond that, when I read the text of the six-page decision, I was even more so convinced that I had taken the appropriate standard of law and the appropriate steps in analyzing the case before this court and in reaching the February 28th, 2003 decision. And some of the rationale in the restatement of the law that is found in this Court of Appeals, March 25th, 2003 decision, it is the same law of the case that I considered when I analyzed what the plaintiff did in this case and whether or not what he did and what circumstances it was performed under, whether or not it represented facts that could support a claim that the court could deem is frivolous. At Page 8, I state the law, the same law that's found in the Court of Appeals case, that [15] is, whether a claim is frivolous presents a mixed question of law and fact. Failures of proof, incorrectness of the claim and a loss on the merits do not render claims frivolous. Wisconsin Statutes Section 814.025 requires that the parties and their attorneys investigate both the facts and the law. A claim is deemed frivolous under sub (3)(b) when the party or attorney knew or should have known that the claim was without any reasonable basis in law or equity. The inquiry under sub (3)(b), therefore, is an objective one, and utilizes a mixed question of law and fact. Sort of a de novo review in every case and certainly in a case where the claims are factually and legally and the parties are different.

In the defendants' arguments, even though you have referenced the March 25th, 2003 in the Court of Appeals decision, I found those arguments to be exactly analogous to the arguments I already assessed, and even after reading the Court of Appeals decision, I didn't find any fact in their analysis or law in their assessment of it that demonstrate any inconsistent result in the case before this court. I, in fact, I can ultimately say an inconsistent result was not reached, because I found that there was an entirely different defendant in the litigation [16] before this court than the litigation that the Court of Appeals was assessing. Additionally, even if someone could sympathize with the defendant in a case before this court because of the length of the litigation that has been undertaken in the case before this court, and I think I summarized some of that at Page 2, I talk about the history of the case going back to '97 all the way through the decisions before this court, that it is quite lengthy and could be frustrating to someone, any party, whether you are on one side or the other of the "V," but certainly, simply being sympathetic to the frustration that one might feel in defending against an accusation is not a basis upon which I can render an action frivolous. I agree with Mr. Zales' conclusions about the March 25th, 2003, Court of Appeals decision, that it is distinctly different, and even if I look at it, I found that they use the same law, they looked at facts in a different case and they reach a conclusion. If that conclusion is different than the conclusion I reach in this case, it has no bearing on the assessment because I'm bound by the standards of law that they have quoted even in that case in using an objective test and in assessing the facts of the case before this court and applying the standards of [17] law to the facts of the case before this court and using the same approach that they did in coming to a conclusion,

and I will reiterate the conclusion that I reached in this case. At the last paragraph on Page 11, the court wrote, although some of the cases in the two cases are similar, the case – it should be some of the issues in the two cases are similar, the case before this court differs in that the plaintiff sued the different parties under slightly different theories. The claims of the plaintiff were defeated at summary judgment only after an evaluation of an extensive examination of caselaw and review of several appeals. Therefore, consistent with the rationale of the Court of Appeals, although some of the plaintiff's arguments appear to be frivolous, this court cannot conclude that the entirety of the case before this court is frivolous. And if you need any clarification with the consistent, with the rationale of the Court of Appeals, what I'm referring to is the rationale is based in law. I applied the same standards of law to a different set of facts because the case facts are different, and so I reached a different conclusion than they ultimately reached, but that's okay, because it is an objective test and objective tests may render the use of the [18] law when facts are different to produce a different result. That's what the legal analysis is all about making. Sure, we have the right standard of law and applying it to the sufficient facts of a particular case.

Therefore, as I did on February 28th, 2003, I will do so again in response to your motion for reconsideration, and that is, conclude that on the basis of the record including the assessment of the March, 2003 Court of Appeals case, this court hereby orders that the defendants' motion for reconsideration is denied.

Is there anything further that we need other than a final written order, so that – that terminates this court's jurisdiction at this juncture, Attorney Faught?

MS. FAUGHT: I don't believe so, Your Honor. I can submit that to the court.

THE COURT: Is there any further comment you wish to make at this time?

MS. FAUGHT: No, Your Honor.

THE COURT: Mr. Zales?

MR. ZALES: Thank you, Your Honor.

Yes, we do want the final order for judgment or – and/or separate order as to this hearing just

* * *

APPENDIX N

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

CIVIL DIVISION

RONALD W. MORTERS

Plaintiff,

v.

Case No. 99-CV-005303

CHARLES H. BARR

Defendants.

SHANNON L. MORTERS,

Plaintiff,

v.

Case No. 00-CV-001705

CHARLES G. BARR and TIG INSURANCE COMPANY,

Defendants.

DECISION AND ORDER
(Filed Oct. 18, 2001)

STATEMENT OF THE CASE

In separate but consolidated complaints, Ronald Morters and his granddaughter, Shannon Morters, allege that in 1991 they retained attorney Charles Barr to represent them with respect to personal injury claims arising out of a motor vehicle accident, and that Barr was negligent in handling their claims. Ronald Morters' wife was also injured in the accident and was represented by attorney Barr, but she is deceased and is not a

* * *

Plaintiffs' first claim against Mr. Barr is an alleged deprivation of a jury trial. This claim is frivolous for many reasons. Although the original trial date was cancelled, Mr. Barr was terminated in his representation before a new trial date could be set. In addition, the decision to submit to arbitration prevented any jury trial anyway. The arbitration decision occurred after Mr. Barr's representation was terminated. It is abundantly clear that Mr. Barr could not have been responsible for any perceived deprivation of a jury trial. Accordingly, this claim is frivolous.

Plaintiffs next claim that Mr. Barr had a conflict of interest in representing all of the plaintiffs. This issue was specifically addressed previously in Judge Kiefer's court in Waukesha County, and Judge Kiefer held that there was no conflict of interest. This claim had previously been litigated and lost, and a reasonable attorney should have known that filing this claim against Mr. Barr again was frivolous.

Plaintiffs also made a claim against Mr. Barr relating to life insurance and worker's compensation claim. Defendants previously filed a motion for summary judgment on this claim, and plaintiffs never responded. Defendants were granted their motion for summary judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.

Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. *Schlomer v. Perina*, 169 Wis. 2d 247, 253, 45 N.W.2d 399, 402 (1992). There was no statute

of limitations problem, as Mr. Barr filed the complaint nine months before the statute of limitations was to run. Also, plaintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.

Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration judgment stands as the final value of this case. It makes no difference what amount of monetary compensation Mr. Barr would have asked for since the actual value of the case is $557,000. Even if it were true that Mr. Barr had not asked for the insurance policy limit, there is still no damage to the plaintiffs. No matter what dollar amount Mr. Barr requested, plaintiffs would still only be entitled to what the case is worth – $557,000.

Plaintiffs' claim against Mr. Barr for failing to adequately prepare and present the Morters' claim to the insurance company was lost from the very beginning. Plaintiffs should have known that there was no damage, and pursuing its claim was frivolous.

THEREFORE, it is hereby ordered that Charles H. Barr's and TIG Insurance Company's motion for frivolous

claims is granted and Charles H. Barr's and TIG Insurance Company's motion for actual reasonable attorney's fees and costs is granted to be paid by the plaintiffs and/or its attorneys. The defendants should provide a detailed accounting to the Court evidencing such attorneys fees being requested under the five (5) day rule, and an Order for Judgment covering such attorneys fees.

Dated at Milwaukee, Wisconsin this 18th of October, 2001.

BY THE COURT:

/s/ Dennis P. Moroney
Honorable Dennis Moroney
Circuit Court Judge
Branch 20
Case No. 99-CV-005303
00-CV-001705

APPENDIX O

COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2011

STATE OF WISCONSIN

Cir. Ct. Nos. 99CV5303 & 00CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions..*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Ronald and Shannon Morters appeal the order granting partial summary judgment, and a later judgment entered in the respondents' favor. The Morters complain that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents have filed a motion requesting frivolous costs on appeal. We affirm all the trial court's rulings. Further, we deem this appeal frivolous. Thus, we remand this matter to the trial court for a determination of frivolous costs on appeal.

I. BACKGROUND.

¶2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most

[1] Judge John A. Franke proceeded over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

serious injuries. The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident. Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict. The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶3 Ronald Morters then challenged the motion filed by his first two attorneys requesting that their legal fees be paid out of the settlement. The trial court ruled that the Morters did not have just cause to discharge Barr or the second law firm, and that these attorneys were entitled to their fees out of the arbitration award.

¶4 Morters and his granddaughter then started legal malpractice suits against Barr,[2] claiming that Barr had a

[2] Ronald's wife, Ann, died before either suit was filed.

conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; and that he had failed to demand the policy limits or file a statutory offer to settle. During the pendency of this action, the trial court consolidated the two lawsuits over the objections of the Morters, granted partial summary judgment to the respondents, and granted a motion in limine brought by the respondents. Later, the trial court directed a verdict for the respondents at the close of the Morters case-in-chief.

II. ANALYSIS.

A. *The trial court properly exercised its discretion when consolidating the suits of Ronald and Shannon Morters.*

¶5 The Morters argue that the trial court erroneously exercised its discretion when it consolidated their two separate suits. They contend that the two actions were "distinct" from one another, and their consolidation led to Shannon Morters' lawsuit being "lost in the shuffle." We disagree.

¶6 WISCONSIN STAT. § 805.05 (1999-2000)[3] permits a court to "order all the actions consolidated" if they "might have been brought as a single action." The trial court's decision to consolidate actions is reserved for the sound discretion of the circuit court. *See* ***Fire Ins. Exchange v. Basten***, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996). Thus, we look to see whether the trial court erroneously exercised its discretion.

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[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶7 Here, the trial court's exercise of discretion in consolidating the two separate suits was proper. As noted by the respondents, the two complaints contained numerous identical paragraphs, made the identical claims, and sought

* * *

Thus, the trial court properly directed a verdict in favor of the defendants because no credible evidence or inferences from the evidence would have permitted a jury to award damages to the Morters.

E. *Frivolous costs on appeal are appropriate here.*

¶25 The respondents have filed a motion seeking frivolous costs. They contend that the appeal of this matter is frivolous because the briefs filed on behalf of the Morters are totally devoid of a factual presentation, and are most likely deficient under WIS. STAT. § 809.19. The Morters have not replied to this request. We agree that this appeal is frivolous.

¶26 WISCONSIN STAT. § 809.25(3) permits this court to find an appeal frivolous if "the party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal or existing law." Here, the briefs did not entirely comply with the requirements set forth in WIS. STAT. § 809.19(1)-(3).[8] The

[8] WISCONSIN STAT. § 809.19(1)-(3) provide:

809.19 **Rule (Briefs and appendix).**

(1) BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal. The brief must contain:

(Continued on following page)

(a) A table of contents with page references of the various portions of the brief, including headings of each section of the argument, and a table of cases arranged alphabetically, statutes and other authorities cited with reference to the pages of the brief on which they are cited.

(b) A statement of the issues presented for review and how the trial court decided them.

(c) A statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and, if so, the reasons therefor.

(d) A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.

(e) An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

(f) A short conclusion stating the precise relief sought.

(g) Reference to an individual by first name and last initial rather than by his or her full name when the record is required by law to be confidential.

(h) The signature of the attorney who files the brief; or, if the party who files the brief is not represented by an attorney, the signature of that party.

(i) Reference to the parties by name, rather than by party designation, throughout the argument section.

(2) APPENDIX. The appellant's brief shall include a short appendix providing relevant trial court record entries, the findings or opinion of the trial court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. The appendix shall include a table of contents. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using first

(Continued on following page)

description of the case is vague and the issues are poorly presented. Often extensive portions of the transcripts needed to be read in order to understand the arguments presented. In some instances, the reader needed to guess at the Morters' arguments. Further, the trial court's ruling, that while negligence was shown no causation or damages were proved, was never addressed. Consequently, we remand this matter to the trial court for a determination of the frivolous costs on appeal.

By the Court. – Judgments and orders affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

APPENDIX P

COURT OF APPEALS DECISION DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2011

STATE OF WISCONSIN

Cir. Ct. Nos. 99CV5303 & 00CV1705

IN COURT OF APPEALS DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and orders, of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. This case comes before us on remand from the supreme court. On October 21, 2002, the supreme court issued an order granting the petition for review in the case of *Morters v. Barr,* 2002 WI App 134, 255 Wis. 2d 833, 646 N.W.2d 855, solely with respect to the issue of frivolousness. The supreme court also vacated our decision with respect to that issue and directed us to reconsider whether the issue was frivolous, and to make specific findings as, required by WIS. STAT. RULE 809.25(3)(c) (1999-2000).[2]

¶2 Upon reconsideration, we conclude that the appeal is not frivolous pursuant to WIS. STAT. RULE 809.25(3)(c), because we cannot conclude that the entire appeal is frivolous as required by ***Nichols v. Bennett,*** 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994). However, as our initial alarm was with the complete lack of substance in the appellants' brief, we further conclude that the appellants' brief failed to comply with the requirements of WIS. STAT. RULE 809.19, and accordingly,

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[1] Judge John A. Franke presided over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

award the respondents all costs and fees on appeal, including attorney fees, pursuant to WIS. STAT. RULE 809.83(2).

* * *

APPENDIX Q

COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-2434

STATE OF WISCONSIN

Cir. Ct. Nos. 99CV5303
& 00CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Deininger, JJ.

¶1 PER CURIAM. Ronald W. Morters appeals *pro se* from the order granting the defendants' motion for costs and attorney's fees on the grounds that Morters' claims were frivolous under WIS. STAT. § 814.025(3)(b) (2001-02).[1] Morters also appeals from the judgment awarding $20,000 to the defendants.[2] Morters contends: (1) the trial court erroneously concluded that his claims were frivolous under § 814.025(3)(b); and (2) the trial court erred in its assessment of the costs and fees. We affirm.

I. BACKGROUND.[3]

¶2 Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] A $10,000 judgment was entered against Ronald W. Morters, and a separate $10,000 judgment was entered against his attorney, Robert E. Sutton. Sutton has not appealed his portion of the judgment. Although Morters originally attempted to also appeal his attorney's portion of the judgment, this court dismissed that portion of the appeal on jurisdictional grounds. *Cf.* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 194, 562 N.W.2d 401 (1997) (concluding that a fundamental defect existed when a non-lawyer signed a notice of appeal on behalf of a corporation).

[3] A number of facts involved in this appeal are taken from *Morters v. Barr*, No. 01-2011, unpublished slip op. at ¶1-7 (WI App January 14, 2003), and *Morters v. Barr*, No. 01-2011, unpublished slip op. at ¶2-4 (WI App April 30, 2002).

following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in

* * *

judgment. The failure to even contest the summary judgment motion on this claim makes it clear that this claim was frivolous and should never have been brought.

Plaintiffs claim that Mr. Barr's delay in filing the case caused them damage. Delay by an attorney alone cannot cause damages unless it is probable that the delay caused a loss of a witness, the passing of the statute of limitations, or similar results. ***Schlomer v. Perina***, 169 Wis. 2d 247, 253, 45 N.W.2d 399, 402 (1992). . . . [P]laintiffs presented no evidence to establish that any delay in filing by Mr. Barr caused them damage. A total lack of evidence to support a claim necessitates a finding of frivolousness.

Finally, plaintiffs claim Mr. Barr was negligent in handling their case by failing to request the full policy limits from the insurance company. Plaintiffs would have this court believe that the fact that Mr. Barr failed to request the insurance policy limit of $1,000,000 caused them damage. However, there are two parts to an actionable claim, and even if Barr was negligent, plaintiffs have failed to show any damage. In arbitration, the value of the case was determined to be $557,000. Plaintiffs have not moved to modify, vacate, or otherwise modify this arbitration award. The arbitration value stands as the final value of this case. . . . No matter what dollar amount Mr. Barr [would have] requested,

> plaintiffs would still only be entitled to what the case is worth – $557,000.
>
> . . . . Plaintiffs should have known that there was no damage, and pursuing its [sic] claim was frivolous.

¶11 We agree with the trial court's analysis of Morters' legal malpractice claims. In each instance, Morters failed to allege sufficient facts that could satisfy the elements of the claim. As the trial court adequately established, Morters and his attorney should have known that the needed facts did not exist or could not be developed. Because Morters or his attorney knew or should have known that the positions taken were frivolous, we conclude that the claims were frivolous under WIS. STAT. § 814.025(3)(b).

¶12 Morters also contends that the assessment of costs and fees against him was inappropriate. He argues, "[N]o award should have been made or the award should have been nominal. . . . " Morters believes that this position is consistent with the supreme court's holding in ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 575-79, 597 N.W.2d 744 (1999). We disagree.

¶13 The purpose of the frivolous claim and appeal statutes is to deter litigants from commencing or continuing frivolous actions and to punish those who do. ***Tigerton v. Minniecheske***, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997). A court may impose sanctions upon a litigant – even onerous conditions – so long as they assist the court in deterring frivolous claims and are not so burdensome as to deny the litigant meaningful access to the courts. *See id.*

¶14 In ***Jandrt***, the supreme court stated that "in determining the appropriate amount of fees and expenses,

a court should 'reflect upon equitable considerations in determining the amount of the sanction.'" ***Jandrt***, 227 Wis. 2d at 577 (citation omitted). Logic dictates that reasonable sanctions make a party whole by including all the costs and fees associated with defending against the frivolous claims. ***Id.*** The supreme court also stated that "[i]n some circumstances, '[a] duty of mitigation exists, and a [trial] court should ensure that the party requesting fees has not needlessly protracted the litigation.'" ***Id.*** at 578 (citation omitted).

¶15 Based on ***Jandrt***, Morters concludes that the costs and fees assessed against him were too severe, because the defendants needlessly protracted the litigation. Unfortunately, Morters argument indicates that he *still* has not learned his lesson regarding the development of a solid argument to support his claims. Morters makes a number of bald assertions, but never adequately demonstrates how the defendants *needlessly* protracted the litigation. Rather, this appeal and the case below validate the very existence of the frivolous claim and appeal statutes. Unfortunately, Morters remains undeterred from commencing or continuing frivolous actions. Accordingly, the trial court was justified in sanctioning Morters. Because we conclude that the amount of the judgment entered against Morters was reasonable, we affirm.

¶16 Based on the foregoing rationale, the trial court is affirmed.

By the Court. – Order and judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX R

STATE OF WISCONSIN :	CIRCUIT COURT :	MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

-vs- CASE NO. 99-CV-005303

CHARLES H. BARR, et al,

Defendants.

SHANNON MORTERS,

Plaintiff,

-vs- CASE NO. 00-CV-001705

CHARLES H. BARR, et al,

Defendants.

MOTION HEARING

January 26, 2004

Proceedings Held Before The
HONORABLE DENNIS P. MORONEY
Circuit Court Judge
Milwaukee County, Branch 20

APPEARANCES:

RONALD MORTERS, 2755 Minot Lane, Waukesha, Wisconsin 53188, Appeared Pro Se.

WILLIAM P. CROKE, Attorney at Law, Quale, Feldbruegge, Calvelli, Thom & Croke, 710 N. Plankinton Avenue, 9th Floor, Milwaukee, Wisconsin, 53203 appeared on behalf of the Defendants.

SUSAN M. HAVENS, CPR, RPR, RMR
Official Court Reporter

* * *

[6] them decided, that's the law of the case. And that is in effect a decision, okay?

Let's – I do agree that this is an attempt to try to relitigate this whole thing. You know, I really don't have any intention of doing that because I think we litigated it more than enough.

I think that one of the problems you had here – and this is true, I said this before – you know, you had a very serious allegation here against an attorney at law, an officer of the court, that you better be able to prove up your case when you said you had these things and he failed to exercise those degree of professional responsibilities which you made allegations about. And you didn't do that.

More importantly, you didn't do that after this – after – I was only on the case – I was only in this assignment for five days when I first saw this case, I might tell you, where I was reviewing whether or not what were we doing on this case. And I looked at it very simply from a duty, breach, cause, damage concept initially. And there were never any damages in this case available because of the arbitration which you had accepted.

MR. MORTERS: Yes, Your Honor.

[7] THE COURT: And so this thing just kept going and going and going and going, which I felt was inappropriate under the circumstances because it didn't meet the basic tests involved with what is an appropriate situation.

Now, I blamed both you and Sutton for that, and I did that when I apportioned the damages between you. And I think that in your case, you had a – I mean, there's certainly – I don't think it was well reasoned, perhaps, from a legal standpoint, but I also think there was a greed factor in it from your standpoint. And the issue was should you be responsible, or should he be responsible.

And I thought based on the evidence it takes two to tango. And I thought you and he made a great team together. Unfortunately, you had the wrong concept in mind. And you had a very serious consequence that could have been obtained against the person with some kind of professional credentials. You can't take that so willy-nilly; I mean, either you have a case or you don't. If you have a case, I don't care who it's against, I'll try it and I'll do whatever I have to. But by gosh, if you don't, you shouldn't be bringing them. And that's – that's one of the sanctions. When I used [8] the word "sanctions" I meant that. That's what the law provides for.

And so you did deserve to be punished for what you did in this case and the expense that you cost to the insurance company for having to defend the man and to his professional reputation. That means something, Mr. Morters, whether you want to think so or not. And I'm not going to let you out of this judgment. You were wrong in bringing it then and you're wrong in being back here now.

And I'll allow costs on the motion.

Submit your affidavit, Mr. Croke.

MR. MORTERS: Your Honor, may I make a comment, Your Honor?

Mr. Croke has made allegations that we had no proof for damages whatsoever.

Could you answer one question?

THE COURT: No. Stop once.

I made the determination that there was no damages. Mr. Croke didn't. I said there wasn't. The matter of law when you have an arbitration on the transaction, occurrence, or event in this matter, and that particular arbitration was not in any way challenged by you in terms of it being contrary to law, arbitrary, capricious or the

* * *

APPENDIX S

COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-0741

STATE OF WISCONSIN

Cir. Ct. Nos. 99CV005303
00CV001705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANT-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF,

v.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Vergeront, JJ.

¶1 PER CURIAM. Ronald W. Morters, *pro se,* appeals from a trial court order denying his motion to reopen a judgment assessing frivolous costs against him in his legal malpractice suit against his former attorney, Charles H. Barr, and assessing additional attorney's fees to Barr and his insurance company for appearing for and responding to the motion. Morters contends that the judgment assessing frivolous costs against him should be "reopened, set aside, and nullified" in the interests of justice, pursuant to WIS. STAT. § 806.07(1)(h) (2001-02).[1] Because the trial court did not erroneously exercise its discretion in denying Morters request for relief, we affirm.

I. BACKGROUND.

¶2 The facts of this case have been summarized by this court before.[2] Ronald Morters was involved in a multi-car accident when a driver crossed the center line during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] As such, the factual background is provided largely by ***Morters v. Barr,*** No. 02-2434, unpublished slip op. ¶¶ 2-7 (WI App Mar. 25, 2003) (citing ***Morters v. Barr,*** No. 01-2011, unpublished slip op. ¶¶1-7 (WI App Jan. 14, 2003); ***Morters v. Barr,*** No. 01-2011, unpublished slip op. ¶¶2-4 (WI App Apr. 30, 2002)).

the Morters were injured, with Ronald having the most serious injuries.

* * *

responsible for bringing the frivolous action, because "based on the evidence it takes two to tango." The trial court noted that while Sutton's legal reasoning was faulty, both Sutton and Morters were responsible for maintaining the frivolous action. The trial court concluded that Morters "did deserve to be punished for what [he] did in this case and the expense that [he] cost to the insurance company for having to defend the man and to [sic] his professional reputation." Furthermore, that trial court stated, "You were wrong for bringing it then and you're wrong in being back here now."

¶13 Clearly, the trial court did not find any extraordinary circumstances warranting the relief Morters requested. Despite Morters' assertion that Sutton should bear all responsibility for the frivolous costs because Morters now realizes and admits that his action against Barr was frivolous, the trial court concluded, in no uncertain terms, that both Morters and Sutton were responsible for the maintenance of the suit. It viewed Morters' current plea for relief as an attempt to relitigate issues that had already been decided and were final. Implicit in the trial court's decision was its concern for the finality of the judgment and its conclusion that the fees were justly imposed. As Morters has failed to establish any extraordinary circumstances justifying relief, the trial court properly exercised its discretion in denying Morters request to vacate the judgment.

¶14 Moreover, in regard to Morters' claim that the fact that a petition has been filed requesting a rule change

that would add a "safe harbor" provision to Wisconsin's rules regarding frivolous claims supports his contention that it would be in the interests of justice to vacate the judgment against him fails for a number of reasons. First, Morters has failed to provide us with any authority in support of the proposition that a petition for a rule change supplies the requisite extraordinary circumstances necessary for relief. Second, there has yet to be a change in the law, and we can hardly conclude that it would be in the interests of justice to vacate a judgment that was entered consistent with the law as it stands. For these reasons, we affirm.

By the Court. – Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX T

COURT OF APPEALS DECISION DATED AND FILED

May 5, 1999

Marilyn L. Graves
Clerk of Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 97-3054
98-0589

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

No. 97-3054

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

ANN MARIE MORTERS, AND SHANNON L. MORTERS, A MINOR, BY VINCENT MORTERS AND ROBIN MASLAKOW, HER GENERAL GUARDIANS,

PLAINTIFFS,

v.

JOSEPH R. KUENZLI AND SHILA A. KUENZLI, HUSBAND AND WIFE, USAA CASUALTY INSURANCE COMPANY, A FLORIDA CORPORATION, AND WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION, A WISCONSIN CORPORATION,

DEFENDANTS,

CROEN & BARR AND AIKEN & SCOPTUR, S.C.,

RESPONDENTS.

No. 98-0589

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

ANN MARIE MORTERS, HUSBAND AND WIFE, AND SHANNON L. MORTERS, A MINOR, BY VINCENT MORTERS AND ROBIN MASLAKOW, HER GENERAL GUARDIANS,

PLAINTIFFS,

CROEN & BARR AND AIKEN & SCOPTUR, S.C., AND WILLIS J. ZICK,

RESPONDENTS,

V.

JOSEPH R. KUENZLI AND SHILA A. KUENZLI, HUSBAND AND WIFE, USAA CASUALTY INSURANCE COMPANY, A FLORIDA CORPORATION, AND WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION, A WISCONSIN CORPORATION,

DEFENDANTS.

APPEALS from orders of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Robert W. Morters has appealed from an order entered in the trial court on September 19, 1997, determining that the law firms of Croen & Barr and Aiken & Scoptur, S.C., have valid attorneys' liens for one-third of the gross recovery awarded Morters and the other plaintiffs in this litigation. This appeal constitutes court of appeals case no. 97-3054. It is consolidated with court of appeals case no. 98-0589, which constitutes Morters' appeal from an "Order Allocating Fees and Expenses

Among Counsel" entered in the trial court on December 30, 1997.[1] We affirm the orders of the trial court.

This action arose from a motor vehicle accident in which Morters, his wife and his granddaughter were injured. Morters was originally represented by Attorney Charles H. Barr, but alleges that he discharged him for cause and retained the law firm of Aiken & Scoptur. Morters alleges that he then discharged that firm for cause and retained Attorney Willis J. Zick. The personal injury claims were subsequently settled through arbitration. After arbitration, Attorney Zick retained one third of the settlement proceeds paid to the Morterses, plus an amount representing expenses incurred by the various attorneys, pending an allocation of fees and expenses between counsel. A motion for an order allocating fees and expenses was then filed by Attorney Barr.

On August 29, 1997, the trial court conducted an evidentiary hearing on the issue of whether Attorney Barr and Aiken & Scoptur had valid, enforceable liens for attorneys' fees or whether Morters discharged them for cause. At the conclusion of the hearing, the trial court made findings of fact determining that Morters did not discharge Attorney Barr or Aiken & Scoptur for just cause, and that their fee agreements with the Morterses were valid and enforceable. Based on these findings, the trial court determined that Aiken & Scoptur and Attorney

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[1] In his brief-in-chief in case no. 98-0589, Morters states that his appeal is from an order entered in the trial court on January 9, 1998, denying his motion for reconsideration of the December 1997 order. However, he withdrew this representation in his reply brief, reiterating that the appeal was from the December 1997 order allocating fees and expenses among counsel.

Barr's law firm, Croen & Barr, had valid attorneys' liens for one-third of the gross recovery made by the Morterses in the arbitration of their claims.

In challenging this order, Morters argues that the trial court lacked jurisdiction to determine whether he and his family properly discharged Attorney Barr and Aiken & Scoptur. He further contends that if the trial court had jurisdiction to address this matter, he was entitled to a jury trial on it.

We reject Morters' arguments for several reasons. Initially, we note that at the August 29, 1997 hearing, Morters conceded that he was not disputing that he was required to pay one-third of the settlement proceeds as attorneys' fees. His claim was simply that Attorney Zick, as opposed to Attorney Barr or Aiken & Scoptur, was entitled to more of the fees.

A party must be aggrieved by an order to have standing to appeal it. *See Mutual Serv. Cas. Ins. Co. v. Koenigs*, 110 Wis.2d 522, 526, 329 N.W.2d 157, 159 (1983). A person is aggrieved if an order bears directly and injuriously upon his or her interests. *See Ford Motor Credit Co. v. Mills*, 142 Wis.2d 215, 217, 418 N.W.2d 14, 15 (Ct. App. 1987). The person must be adversely affected in some appreciable way. *See id.* at 217-18, 418 N.W.2d at 15. Because no basis exists to conclude that Morters' interests were adversely affected by the trial court's determination that Attorney Barr and Aiken & Scoptur were entitled to share with Attorney Zick in one-third of the settlement proceeds, we

are not persuaded that Morters has standing to challenge the September 19, 1997 order.[2]

[2] We recognize that an issue was also raised at the August 29, 1997 hearing as to whether the amount paid in settlement to the Morterses' subrogated carrier, Wisconsin Health Organization Insurance Corporation (WHO), should have been included by Attorney Zick when calculating one-third of the settlement proceeds. However, the trial court did not address or resolve that issue at the August 29, 1997 hearing or in the September 19, 1997 order, and specifically limited the issues which could be addressed at the hearing to the issues of whether Attorney Barr and Aiken &

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